

No. 13088

United States
Court of Appeals
For the Ninth Circuit.

DONALD McKITTRICK and BARBARA Mc-
KITTRICK,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

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PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK

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DONALD McKITTRICK and BARBARA Mc-
KITTRICK,

Appellants,

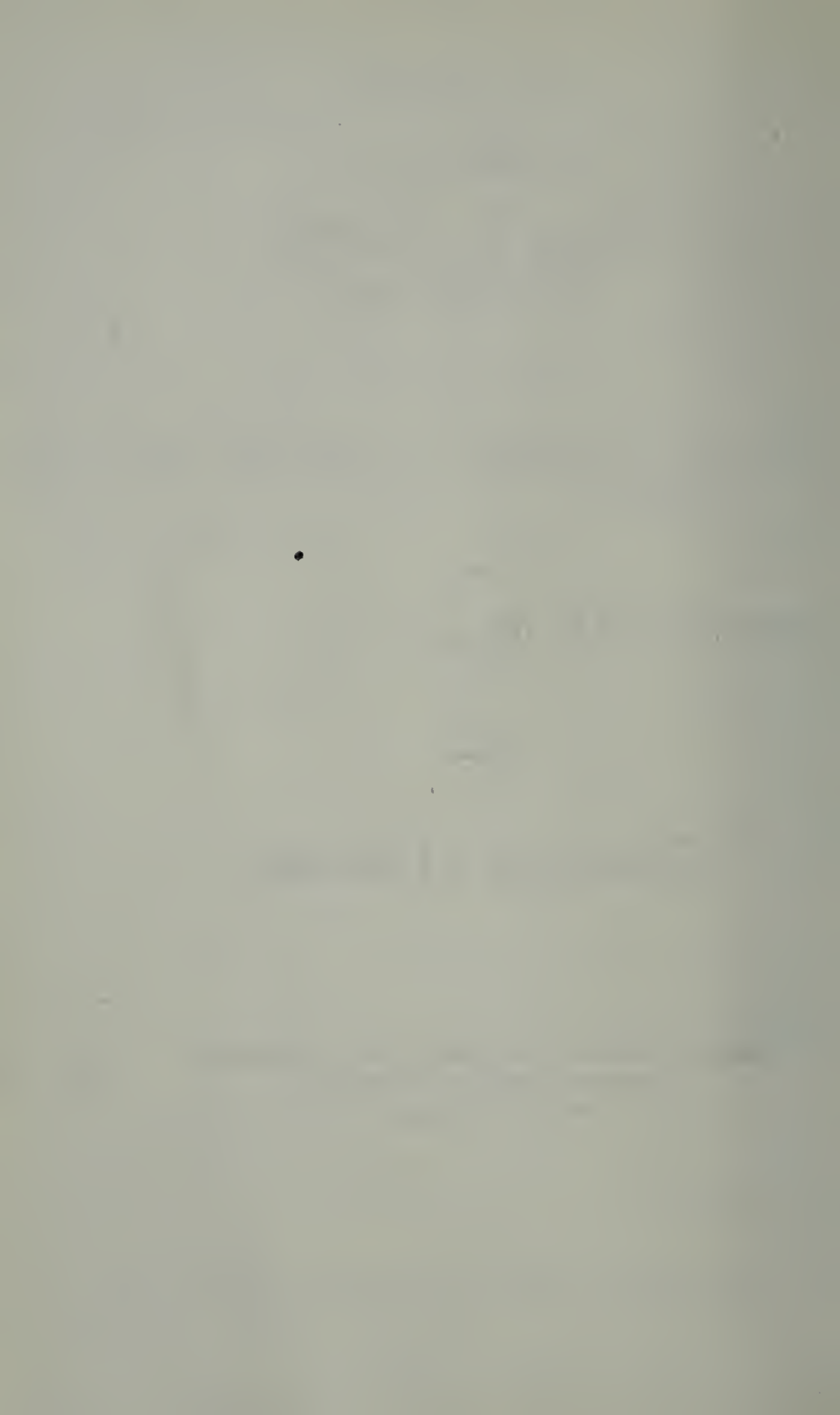
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court for the Northern
District of California, Southern Division

No. 29940

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD McKITTRICK and BARBARA McKIT-
TRICK,

Defendants.

COMPLAINT FOR INJUNCTION,
RESTITUTION AND TREBLE DAMAGES

Count I.

1. In the judgment of the Housing Expediter, the defendants have engaged in acts and practices which constitute violations of Section 4 of the Emergency Price Control Act of 1942, as amended (50 U.S.C.A. Appendix Section 904).

2. Jurisdiction of this action is conferred upon this Court by Sections 1(b), 205(a) and 205(c) of said Emergency Price Control Act of 1942, as amended.

3. At all times mentioned herein defendants were the landlords of and rented certain controlled housing accommodations located within the Alameda County Defense-Rental Area, described as 111 Oakmont Avenue, Piedmont, California.

4. Prior to July 1, 1947, there has been in full force and effect pursuant to said Emergency Price Control Act of 1942, as amended, the Rent Regulations issued pursuant to said Act, establishing a maximum rental for the use and occupancy of housing and rental accommodations within the defense-rental area in which the premises referred to in paragraph 3 of Count I above are located.

5. Prior to July 1, 1947, defendants demanded, accepted or received from tenant occupying the premises described in Paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations, as appears more fully in Item I of Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

6. Prior to July 1, 1947, defendants demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises, rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

Count II.

1. Plaintiff incorporates herein by reference the allegations in Paragraph 3 of Count I of his Complaint herein.

2. In the judgment of the Housing Expediter, the defendants have engaged in acts and practices

which constitute violation of Section 206(a) of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. App. 1881-1906; Public Law 31, 81st Congress, 1st Session).

3. Jurisdiction of this action is conferred upon this Court by Sections 206(b) and 206(c) of said Housing and Rent Act of 1947, as amended.

4. Since July 1, 1947, there has been in full force and effect pursuant to said Housing and Rent Act of 1947, as amended, the Rent Regulations issued pursuant to said Act, establishing a maximum rental for the use and occupancy of housing and rental accommodations within the defense-rental area in which the premises referred to in Paragraph 3 of Count I above are located.

5. Since July 1, 1947, defendants demanded, accepted or received from tenant occupying the premises described in Paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations, as appears more fully in Item 2 of Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

6. Since July 1, 1947, defendants demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

Count III.

1. Plaintiff incorporates herein by reference the allegations in Paragraph 3 of Count I and Paragraph 4 of Count II of his Complaint herein.

2. Jurisdiction of this action is conferred upon this Court by Sections 205 and 206(c) of said Housing and Rent Act of 1947, as amended.

3. Since July 1, 1947, and within one (1) year prior to the date of the commencement of this action (exclusive of the thirty (30) day period immediately prior to the date of the commencement of this action) to wit: between August 13, 1949, and November 13, 1949, defendants demanded, accepted or received from tenant occupying the premises described in Paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations as appears more fully in Item 3 of Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

4. Since July 1, 1947, and within one (1) year prior to the date of the commencement of this action (exclusive of the thirty (30) day period immediately prior to the date of the commencement of this action) defendants demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

5. More than thirty (30) days have elapsed since the occurrence of the violations hereinabove mentioned, and the persons from whom such excess rental payments were demanded, accepted or received have not instituted any action under Section 205 of the Housing and Rent Act of 1947, as amended for said violations.

Wherefore, the Plaintiff demands and prays:

1. That an injunction be issued enjoining the defendants, their agents, attorneys, servants, employees, and all other persons in active concert or participation with the defendant from directly or indirectly demanding, accepting or receiving rents in excess of the maximum rents established by any Regulation or Order heretofore or hereafter adopted, pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended, or extended, or superseded, or from engaging in any acts and practices which constitute or will constitute a violation of any of the provisions of the Housing and Rent Act of 1947, as amended, or extended, or superseded, or of the Rent Regulations issued pursuant thereto.

2. That the defendant be ordered and directed to pay to the Treasurer of the United States, for and on behalf of all persons entitled thereto, a refund of all amounts (the amount presently ascertained by the Plaintiff being the sum of One Thousand Dollars (\$1,000.00) in excess of the lawful maximum rents which have been or may be de-

manded, accepted or received by the defendants from any tenants for or in connection with the use or occupancy of the housing accommodations hereinbefore mentioned; or, in the alternative, that the defendants be ordered and directed to pay the amounts in excess of the lawful rents as hereinabove prayed, to the Treasurer of the United States.

3. That judgment for the Plaintiff be granted herein for Two Hundred Twenty-five Dollars (\$225.00), being three times the amount by which the rents demanded, accepted or received by defendants within one year prior to the date of the commencement of this action, (excluding, however, the 30 days immediately prior to the date of the commencement of this action) exceeded the legal maximum rent.

4. That such other, different or further relief to which Plaintiff may be entitled be granted, or other relief be accorded which the Court may find necessary to effectuate the purposes of the said Act as now existing, or as hereafter amended or superseded, and of any orders or regulations issued thereunder.

5. That Plaintiff recover the costs of this action.

Dated this 31st day of August, 1950.

/s/ RAYMOND J. FOX,

Litigation Attorney, Office of
Housing Expediter.

EXHIBIT A

SCHEDULE

Donald and Barbara McKittrick
P.O. Box 39, Walnut Creek, California

Tenant	Unit	Date Rented	Rent Collected	Maximum Legal Rent	Number of Overcharges	Amount of Each Overcharge	Amt. Subject Overcharge to Each Tenant to Treble Damages
Item 1							
Bruce A. Wilson	House 111 Oakmont Ave. Piedmont, Calif.	7-13-46	Cash bonus paid in advance as condition prior to rental of apartment.				\$300.00
Item 2							
Bruce A. Wilson	House 111 Oakmont Ave. Piedmont, Calif.	7-14-47 to 11-13-49	\$135.00 per mo.	\$110.00 per mo.	28	\$25.00	\$700.00
Item 3							
Bruce A. Wilson	House 111 Oakmont Ave. Piedmont, Calif.	8-13-49 to 11-13-49	\$135.00 per mo.	\$110.00 per mo.	3	\$25.00	\$75.00

[Endorsed]: Filed August 3, 1950.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS DONALD McKIT-
TRICK AND BARBARA McKITTRICK

Come now the defendants, Donald McKittrick and Barbara McKittrick, and answering the complaint on file herein, admit, deny and allege:

1. By way of a first and separate
answer to Count I.

I.

Answering paragraph 1, deny that these defendants, or either of them, have engaged in acts or practices which constitute or constituted violations of Section 4 of the Emergency Price Control Act of 1942 as amended, or otherwise.

II.

Answering paragraph 3, admit that these defendants were landlords and rented the housing accommodations described in said paragraph, but deny that at any time therein mentioned said housing accommodations were subject to any valid rent control order fixing a maximum rent for said housing accommodations less than \$135.00 per month.

III.

Answering paragraph 5, deny that prior to July 1, 1947, these defendants, or either of them, demanded, accepted or received from anyone any rentals in excess of any lawful rental permitted by any valid Rent Regulations.

IV.

Answering paragraph 6, these defendants deny, each and every, all and singular, generally and specifically, the allegations in said paragraph contained.

Wherefore, these defendants pray judgment.

2. As and for a second and separate
defense to Count I.

I.

Allege that more than one year elapsed between the 1st day of July, 1947, and the filing of this action on August 3, 1950.

Wherefore these defendants pray judgment.

3. As and for a third and separate
defense to Count I.

I.

Allege that on July 1, 1947, by virtue of the terms of the statute theretofore in effect, and further by virtue of Section 205 of the Housing and Rent Act of 1947, the Emergency Price Control Act of 1942, as the same was in force prior to July 1, 1947, ceased to exist, and all rights thereunder ceased to exist, and by virtue of Section 205 of the Housing and Rent Act of 1947 plaintiff had no cause of action, and lost any cause of action previously held, by reason of the circumstances set forth in said Count I.

Wherefore these defendants pray judgment.

4. As and for a first and separate
answer to Count II.

I.

Answering paragraph 3 of the first Count as it is incorporated by reference in paragraph 1. of the second Count, admit that these defendants were landlords and rented the housing accommodations described in said paragraph, but deny that at any time therein mentioned said housing accommodations were subject to any valid rent control order fixing a maximum rent for said housing accommodations less than \$135.00 per month.

II.

Answering paragraph 2, deny that these defendants or either of them have engaged in acts or practices which constitute or constituted violations of Section 4 of the Emergency Price Control Act of 1942 as amended, or otherwise.

III.

Answering paragraph 5, deny that since July 1, 1947, these defendants, or either of them, demanded, accepted or received from anyone any rentals in excess of any lawful rental permitted by any valid Rent Regulations.

IV.

Answering paragraph 6, these defendants deny, each and every, all and singular, generally and specifically, the allegations in said paragraph contained.

Wherefore these defendants pray judgment.

5. As and for a second and separate
answer to Count II.

I.

Allege that more than one year elapsed after the making of any rent payments made prior to August 2, 1949, and the filing of this action on August 3, 1950.

Wherefore these defendants pray judgment.

6. As and for a third and separate
defense to Count II.

I.

Allege that from July 1, 1947, and until April 1, 1949, there was in full force and effect Section 205 of the Housing and Rent Act of 1947, and that by virtue of that Section, and at all times from July 1, 1947, and until April 1, 1949, plaintiff had no cause of action by reason of the circumstances set forth in Count II and that no cause of action was created retroactively by reason of the provisions of Section 205 of the Housing and Rent Act of 1949.

Wherefore these defendants pray judgment.

7. As and for a first and separate
answer to Count III.

I.

Answering paragraph 3 of Count I as the same is incorporated by reference in paragraph I of Count III, admit that these defendants were landlords and rented the housing accommodations de-

scribed in said paragraph, but deny that at any time therein mentioned said housing accommodations were subject to any valid rent control order fixing a maximum rent for said housing accommodations less than \$135.00 per month.

II.

Answering paragraph 3, deny that between August 13, 1949, and November 13, 1949, these defendants or either of them demanded or accepted or received from anyone any rentals in excess of any lawful rental permitted by any valid rent regulations.

III.

Answering paragraph 4, deny, each and every, all and singular, generally and specifically, the allegations in said paragraph contained.

IV.

Answering paragraph 5, allege that between July 13, 1946, and November 13, 1949, the tenant of the premises described in said Count III did wilful and wanton damage to the said premises, and the furniture and furnishings therein, and that the said damage so done exceeds the sum of \$1225, and that the cause of action set forth in said Count III, if any ever existed, has been paid and discharged by defendants in full by reason of offset because of said damage and the forbearance of defendants to sue therefor, and was so paid and discharged within 30 days after said cause, if any, in favor of said tenant, arose.

Wherefore defendants and each of them pray that plaintiff recover nothing by this action and that defendants and each of them go hence dismissed.

/s/ FRANCIS T. CORNISH,
Attorney for Defendants, Donald McKittrick and
Barbara McKittrick.

[Endorsed]: Filed August 25, 1950.

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS
To Francis T. Cornish, Attorney at Law, American
Trust Building, Berkeley 4, California.

For the purpose of this action only, pursuant to the provisions of Rule 36, as amended, of the Federal Rules of Civil Procedure, and within ten days after service of this Request, Plaintiff requests the Defendants to admit the genuineness of the documents described and exhibited herewith, if any, and to admit the truth of the following relevant matters of fact.

1. That at all times material to this action Defendants were the landlords of certain controlled housing accommodations, more particularly described and set forth in Exhibit A attached to Plaintiff's Complaint, which schedule is by reference incorporated herein.

2. That the items in said schedule truthfully and correctly designate the names of the tenants who

occupied the designated housing accommodations.

3. That the items in said schedule truthfully and correctly designate the periods said tenants occupied said accommodations.

4. That the items in said Exhibit A truthfully and correctly designate the rentals collected from said tenants.

5. That said schedule truthfully and correctly designates the registered legal rents in force for the indicated housing accommodations for the periods of time referred to in request No. 3.

6. That more than 30 days have elapsed since the date of the alleged overcharges and the tenants named in the aforementioned schedule have not filed suit against Defendants herein to recover said overcharges.

Dated this 20th day of September, 1950.

/s/ REUEL K. YOUNT,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 22, 1950.

[Title of District Court and Cause.]

REPLY TO REQUESTS FOR
ADMISSION OF FACTS

Come now the defendants and make the following answer to the requests for admissions of fact dated September 20, 1950, and made by plaintiff

pursuant to Rule 36 of the Federal Rules of Civil Procedure.

Request No. 1

Defendants admit that they were, from July 13, 1946, until November 13, 1949, both dates inclusive, the owners of the real property consisting of a house and lot commonly known and designated as 111 Oakmont Avenue, Piedmont, California, but do not admit the legal conclusions set forth in said forth in said request for admission of facts.

Request No. 2

Defendants admit that from July 13, 1946, to November 11, 1949, both dates inclusive, Bruce A. Wilson was in possession of the real property consisting of a house and lot commonly known and designated as 111 Oakmont Avenue, Piedmont, California, but do not admit the legal conclusions set forth in said request for admissions of facts.

Request No. 3

Defendants admit the facts as set forth in their answer to request for admission No. 2, but do not admit the legal conclusions set forth in said request for admission of facts.

Request No. 4

Defendants do not admit that Exhibit A attached to the complaint correctly sets forth all the money paid by Bruce A. Wilson to defendants from July 13, 1946, until November 13, 1949, both dates in-

clusive, nor do defendants admit the legal conclusions set forth in said request for admission of facts.

Request No. 5

Defendants do not admit that Exhibit A attached to the complaint truthfully or correctly or fully depicts the financial transactions between Bruce A. Wilson and these defendants, and defendants do not admit the legal conclusions set forth in said request for admission of facts.

Request No. 6

Defendants admit that more than 30 days elapsed between November 13, 1949, and August 30, 1950, and admit that neither defendant has been personally served with summons or complaint in any action brought against defendants or either of them by Bruce A. Wilson. Defendants have been unable to investigate the records of all of the courts in which such action could have been filed, and therefore except as herein expressly admitted, do not admit that Bruce A. Wilson has not filed an action against defendants, and defendants do not admit the legal conclusions set forth in said request for admission of facts.

Dated September 22, 1950.

/s/ FRANCIS T. CORNISH,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 23, 1950.

[Title of District Court and Cause.]

PLAINTIFF'S INTERROGATORIES

To Francis T. Cornish, Attorney at Law, American Trust Building, Berkeley 4, California.

Pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure, as amended, Plaintiff addresses to the Defendants herein the following interrogatories to be answered separately, fully, and under oath within 15 days:

1. Since Defendants admit that for the period from July 13, 1946, until November 13, 1949, they were the owners of certain real property consisting of a house and lot commonly known and designated as 111 Oakmont Avenue, Piedmont, California, state whether or not Defendants rented said property during said period of time.

2. Since Defendants admit that during the period referred to in Interrogatory No. 1 relative to said house and lot mentioned in Interrogatory No. 1, that one Bruce A. Wilson was in possession of said premises during said period, state the terms and conditions of the occupancy of said Wilson of said premises.

3. Is it not a fact that said Wilson rented said premises from the Defendants herein?

4. State whether a rental agreement was made with said Wilson by Donald McKittrick or Barbara McKittrick or both.

5. Is it not a fact that on or about July 13,

1946, the Defendants or one of them demanded and received of said Bruce A. Wilson the sum of \$300.00?

6. Is it not a fact that said sum was paid by check by the said Wilson?

7. Is it not a fact that the Defendants or one of them cashed said check and retained said monies?

8. Is it not a fact that the demand and receipt of said sum paid by said Wilson was in the nature of a bonus for renting the aforementioned housing accommodations?

9. If the answer to the last Interrogatory above is in the negative, state the reason Bruce A. Wilson paid said sum of \$300.00 to the Defendants herein.

10. Is it not a fact that on or about July 13, 1946, the Defendants or one of them entered into a rental agreement for said premises with the said Wilson at a rental of \$110.00 per month?

11. Is it not a fact that the Defendants or one of them agreed to rent said premises to the said Wilson at a monthly rental of \$110.00 per month?

12. Is it not true that for the period beginning on or about July 13, 1946, and ending on or about July 13, 1947, the Defendants or one of them did receive for each and every month of said period monthly rentals in the amount of \$110.00 per month?

13. Is it not true that for each and every month of said period said sum of \$110.00 per month was paid to Defendants herein by the said Wilson by check?

14. Is it not true that on or about July 13, 1947, the Defendants or one of them notified the said Wilson that his monthly rental would be increased to the amount of \$135.00 per month?

15. Is it not true that for the period beginning on or about July 13, 1947, and ending on or about November 13, 1949, the Defendants did receive monthly rentals from the said Bruce A. Wilson in the amount of \$135.00 per month?

16. Is it not true that said rentals were paid to Defendants herein by said Wilson by check?

17. Is it not true that Defendants cashed or deposited said checks for their own personal use?

18. Since Defendants, in response to Plaintiff's Request No. 5 denies that Exhibit A attached to Plaintiff's Complaint "truthfully or correctly or fully depicts the financial transactions between Bruce A. Wilson and these defendants," state in detail the nature and extent of any and all financial transactions between the Defendants and Bruce A. Wilson that pertain to the use and occupancy of the aforementioned housing accommodations by the said Bruce A. Wilson?

Dated this 11th day of October, 1950.

/s/ REUEL K. YOUNT,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 12, 1950.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES SERVED
BY MAIL OCTOBER 11, 1950

Interrogatory No. 1

Defendant, Barbara McKittrick, as lessor, leased said real property to Bruce A. Wilson and Barbara S. Wilson. Neither of these defendants was a lessee thereof during the period asked.

Interrogatory No. 2

Without desiring to express the opinion or conclusion of either of these defendants, they state that the terms and conditions varied from time to time. From July 13, 1946, to July 13, 1947, the terms and conditions were set forth in an agreement in writing, a copy of which is attached and marked Exhibit A. From July 13, 1947, to July 13, 1948, the terms and conditions were evidenced by a writing endorsed on Exhibit A and reading as follows:

“This lease is hereby renewed for the period from July 13, 1947, to July 13, 1948, on the same terms as above (signed) D. S. McKittrick, Barbara McKittrick, Bruce A. Wilson, Beatrice S. Wilson.”

On or about July 13, 1948, the same four signatories orally agreed to extend said lease for an additional period commencing July 13, 1948, and ending July 13, 1949. On or about July 13, 1949, the same four signatories orally agreed to extend said lease for whatever period events might later

require Bruce A. Wilson and Beatrice S. Wilson to prepare and move into a new house which they had then or were about to acquire.

Interrogatory No. 3

Has been answered by the answer to Interrogatory No. 2.

Interrogatory No. 4

Has been answered by the answer to Interrogatory No. 2.

Interrogatory No. 5

On or about July 13, 1946, defendants owned the house in question, and also owned a home in Walnut Creek, which last mentioned home was not subject to rental control. Defendants had been offered \$150.00 per month to rent the Walnut Creek home and had determined to rent the Walnut Creek home and live at 111 Oakmont Avenue, Piedmont. Under these circumstances Bruce A. Wilson and Beatrice S. Wilson, in order to induce these defendants to forego their right to occupy their own home at 111 Oakmont Avenue, Piedmont, for one year, and to occupy and not rent their home in Walnut Creek, and to permit Bruce A. Wilson and Beatrice S. Wilson to enter into possession of 111 Oakmont Avenue, Piedmont, but not as rent for 111 Oakmont Avenue, Bruce A. Wilson and Beatrice S. Wilson paid defendants the sum of \$300.00.

Interrogatory No. 6

Yes.

Interrogatory No. 7

Yes.

Interrogatory No. 8

No, the money was paid in consideration for these defendants foregoing for a period of one year their right to occupy their own home and to rent out another which they did for that reason occupy and for which they could have received a greater rent.

Interrogatory No. 9

Bruce A. Wilson and Beatrice S. Wilson paid said sum for the reason set forth in the answers to interrogatories Nos. 5 and 8.

Interrogatory No. 10

This has been answered by the answer to interrogatory No. 2.

Interrogatory No. 11

This has been answered by the answer to interrogatory No. 2.

Interrogatory No. 12

Yes.

Interrogatory No. 13

Defendants cannot recall positively the means by which each payment was made.

Interrogatory No. 14

No. Defendants notified Bruce A. Wilson and Beatrice S. Wilson prior to July 13, 1947, that defendants desired to move back into 111 Oakmont Avenue, Piedmont. Bruce A. Wilson and Beatrice

S. Wilson thereupon, in order to induce defendants to forego possession of their own house for another year and to occupy their Walnut Creek home and not rent it out for that period, Bruce A. Wilson and Beatrice S. Wilson offered to pay an additional sum of \$300.00. After defendants agreed to this, Bruce A. Wilson and Beatrice S. Wilson asked for permission to pay said sum of \$300.00 at the rate of \$25.00 per month. This was agreed to and the money was paid in that manner.

Interrogatory No. 15

No. From July 13, 1947, to July 13, 1948, Bruce A. Wilson and Beatrice S. Wilson paid \$110.00 per month rent and the sum of \$300.00 at the rate of \$25.00 per month as is set forth in the answer to interrogatory No. 14. On or about July 13, 1948, the four signatories mentioned in the answer to interrogatory No. 2 entered into the oral agreement to extend said lease as set forth in the answer to interrogatory No. 2 and also entered into an oral agreement that if defendants would forego their right to occupy their own home at 111 Oakmont Avenue, Piedmont, for another year and during that period occupy and not rent their Walnut Creek home at a larger rental, Bruce A. Wilson and Beatrice S. Wilson would pay defendants the sum of \$300.00 at the rate of \$25.00 per month. On or about July 13, 1949, the said four signatories entered into an oral agreement that if defendants would forego their right to occupy 111 Oakmont Avenue, Piedmont, until a certain home then being prepared for Bruce A. Wilson and Beatrice S.

Wilson was completed and ready for occupancy, said Wilsons would pay defendants' rent at the rate of \$110.00 per month and an additional sum of \$25.00 for foregoing defendants' right of occupancy of 111 Oakmont Avenue, Piedmont. All sums agreed to be paid were paid.

Interrogatory No. 16

Defendants cannot now positively recall the manner in which all of the payments were made.

Interrogatory No. 17

Defendants cashed and received the proceeds from all checks given to them by Bruce A. Wilson and/or Beatrice S. Wilson.

Interrogatory No. 18

Exhibit A attached to the Complaint fails to show rent of \$110.00 per month paid from July 13, 1946, to July 13, 1947. It also fails to distinguish between rent paid at \$110.00 per month and money paid to defendants to induce them not to exercise their right to occupy their own home and rent out their Walnut Creek home for a higher rental than could be received for 111 Oakmont Avenue, Piedmont. It also fails to record that when Bruce A. Wilson and Beatrice S. Wilson occupied 111 Oakmont Avenue, Piedmont, they allowed damage amounting to several hundred dollars to defendants' furniture to occur from moths, and upon vacating the premises they took with them pictures belonging to defendants and valued in excess of \$500.00.

/s/ DONALD McKITTRICK.

State of California,
County of Alameda—ss.

Donald McKittrick, being first duly sworn, deposes and says: That he has read the foregoing Answers to Interrogatories and they are true to the best of his knowledge and belief.

/s/ DONALD McKITTRICK.

Subscribed and sworn to before me this 26th day of October, 1950.

[Seal] /s/ FRANCES M. GUIDICI,
Notary Public in and for the County of Alameda,
State of California.

EXHIBIT A

Lease

This Indenture, Made and entered into at Walnut Creek, County of Contra Costa, State of California, this 13th day of July, 1946, By and Between Barbara McKittrick, the party of the first part, and Bruce A. Wilson and Beatrice S. Wilson, the parties of the second part,

Witnesseth: That for and in consideration of the payment of the rents and the performance of the covenants contained herein on the part of the said parties of the second part, and in the manner hereinafter stated, said party of the first part does hereby lease, demise and let unto the said parties of the second part that certain Dwelling House and its appurtenances located at 111 Oakmont Ave. in

the City of Piedmont, County of Alameda, State of California, and certain furnishings as per an inventory shown by the lessor and signed by the lessee and lessor and which is a part of this lease,

For the Term of One Year commencing on the 13th day of July (12 N), 1946, and ending on the 13th day of July (12 N), 1947, at the rent or sum of Thirteen hundred twenty 00/100 Dollars (\$1320.00) payable monthly in advance of the 15th day of each and every month of said term.

And It Is Hereby Agreed, that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter said premises and remove all persons therefrom.

And the Said parties of the second part do hereby promise and agree to pay to the said party of the first part the said thirteen hundred twenty dollars rent herein reserved in the manner herein specified. And not to let or underlet the whole or any part of the said premises, or to make or suffer any alteration to be made therein without the written consent of the party of the first part; and not to assign this Lease without the written consent of the said party of the first part. And it is further agreed that the said party of the first part shall not be called upon to make any improvements whatsoever upon the demised premises, or any part thereof, but the said party of the second part agree to keep the same in good order and condition at their own expense. And that at the expiration of said term, or any sooner determination of this

Lease, the said parties of the second part will quit and surrender the premises hereby demised in as good order and condition as reasonable use and wear thereof will permit, damages by the elements excepted. And if the parties of the second part shall hold over said term, with the consent, express or implied, of the party of the first part, such holding shall be construed to be a tenancy only from month to month, and said second parties will pay the rent as above stated for such further times as they may hold the same. The parties of the second part agree to pay the Water Rate during the continuance of this Lease, and that the lessee shall use the premises for a family dwelling for one family only consisting of two adults and one child of 15 years and that no house pets shall be kept on the premises without special and express permission.

And that the lessor shall turn over the complete property and furnishings thoroughly and completely cleaned with windows cleaned, blinds cleaned, floors cleaned, waxed, and polished and all trash removed and entire property ready for occupancy and that the lessees shall do exactly the same at the end of their tenancy. And that the lessor shall turn over the garden in good condition and that the lessees shall do all cultivating, fertilizing and irrigating necessary to maintain it during their tenancy and to return it in as good condition as they received it. And that the lessees shall pay for all their own utility services. And that the lessee shall pay for all repairs to the home or furnishings that cost less than ten dollars (\$10.00) and that the lessees shall

pay ten dollars (\$10.00) out of the total of all repairs when that cost is greater than ten dollars (\$10.00).

Receipt is hereby acknowledged of One hundred ten (\$110.00) which constitutes the first month rent under this lease.

In Witness Whereof, the said parties have hereunto, and unto a duplicate original hereof, set their hands and seals the day and year first above written.

/s/ BARBARA MCKITTRICK,

/s/ BRUCE A. WILSON,

/s/ BEATRICE S. WILSON.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 28, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause was commenced on August 3, 1950, the Plaintiff seeking restitution under Section 205 (a) of the Emergency Price Control Act of 1942 as amended (50 U.S.C.A. App. 901 et seq.), and treble damages under Section 205 and an injunction and restitution under Section 206(b) of the Housing and Rent Act of 1947 as amended (50 U.S.C.A. App. 1881 et seq.). Personal service of the complaint and summons as required by the Federal Rules of Civil Procedure was made by a

Deputy United States Marshal on August 8, 1950.

Following the Defendants' answers to the complaint and to the request for admissions and interrogatories served by the Plaintiff, the cause came regularly on for trial on December 28, 1950, before this Court, the Honorable Oliver J. Carter Judge presiding, and the Plaintiff appearing by its counsel William B. Spohn and the Defendants appearing in person and by their Counsel Francis T. Cornish. Evidence both oral and documentary was introduced by and on behalf of the respective parties, and arguments made and briefs filed by counsel. The Court being fully advised in the premises, made its order for judgment on February 12, 1951, and its amended order for judgment on April 25, 1951, pursuant to which are the following:

Findings of Fact

(1) That the housing accommodations described in the complaint are located within the Alameda County Defense-Rental Area.

(2) That the accommodations were originally registered by the Defendant Barbara McKittrick in the Area Rent Office on September 6, 1944, at a monthly rental of \$150, which was reduced to \$110 per month by order of the Area Rent Director issued April 3, 1945.

(3) That on or about July 13, 1946, the Defendants leased the accommodations to Bruce A. Wilson for one year at a total rent of \$1320.

(4) That as a condition thereof, although not mentioned in the lease, the Defendants required

the tenant to pay an additional \$300 in cash, representing an excess of \$25 per month over the prescribed rent for the accommodations.

(5) That upon the expiration of said lease in July, 1947, and continuing to or about November 13, 1949, the Defendants did demand, accept and receive from the tenant monthly rentals of \$135 for the accommodations, in total excess of the prescribed rent in the amount of \$700.

(6) That following the tenant's discovery of the prescribed rent later in November, 1949, he made a written request upon the Defendants for restitution of the total overcharges, which the Defendants failed to make, either in whole or in part.

(7) That no action has been instituted by the tenant under either of the aforesaid Acts on account of the overcharges here involved, and more than thirty days (30) have elapsed since the last such overcharge.

(8) That three of the aforesaid monthly overcharges of \$25 each for which damages are sought in this proceeding occurred within one year of the filing of the complaint herein.

(9) The three monthly overcharges of \$25 each were wilfully demanded, accepted and received within one year immediately prior to the filing of the complaint herein.

(10) That between July 13, 1946, and November 13, 1949, the tenants, Bruce A. Wilson and Beatrice Wilson, did not wilfully and wantonly

damage the premises nor the furniture and furnishings at 111 Oakmont Avenue, Piedmont, California, in the amount of \$1,225.00, or any sum whatsoever.

Conclusions of Law

(1) That the Court has jurisdiction of the subject matter of this action and of the parties under the aforesaid Emergency Price Control Act and the Housing and Rent Act.

(2) That the housing accommodations in question were controlled by the aforesaid Acts and the Regulations issued pursuant thereto with the exception of the period from June 30, 1946, to July 25, 1946.

(3) The maximum legal rent prescribed for the housing accommodations under the Acts and Regulations was \$110 per month at all times other than from July 13, 1946, to July 25, 1946.

(4) That the Defendants by demanding, accepting and receiving the overcharges specified in the foregoing Findings of Fact, did knowingly violate the Acts and regulations.

(5) That the Defendants have failed to satisfactorily show why the equitable power of this Court should not be exercised, or to satisfactorily assume the burden of proving that the acceptance of the overcharges within the year immediately preceding the filing of the complaint herein was not wilful nor the result of failure to take practicable precautions against such occurrence.

(6) That the Plaintiff, on account of said violations, is therefore entitled to have and recover treble damages from the Defendants in the total amount of \$225.

(7) That the Plaintiff, on account of said violations, is entitled to an injunction against any further violations by the Defendants under the aforesaid Housing and Rent Act and regulations as prayed for in the complaint.

(8) That the Plaintiff, on account of said violations, is entitled to a judgment and decree requiring and directing the defendants to forthwith refund to the Plaintiff on behalf of the tenant Bruce A. Wilson, or in the alternative to the Plaintiff on its own behalf in the event said tenant cannot be located after appropriate effort, the aforesaid overcharges in the total amount of Nine Hundred and Seventy-Five Dollars.

(9) That the defendants are entitled to take nothing by reason of their claim of set off for damages.

(10) That the Plaintiff is entitled to its costs in this action.

Let judgment be entered in accordance herewith.

Dated this 27th of April, 1951.

/s/ OLIVER J. CARTER,

United States District Judge.

Lodged April 27, 1951.

[Endorsed]: Filed April 27, 1951.

United States District Court for the Northern
District of California, Southern Division

No. 29940

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD McKITTRICK and BARBARA Mc-
KITTRICK,

Defendants.

JUDGMENT AND DECREE

Findings of Fact and Conclusions of Law having
been filed in the above-entitled cause,

Wherefore, by reason of the law, the pleadings,
and the premises contained in said Findings and
Conclusions,

It Is Hereby Ordered, Adjudged, and Decreed
that the Defendants, their attorneys, agents, serv-
ants, employees and all other persons in active
concert or participation with the Defendants, be
and they are hereby permanently enjoined and
restrained from directly or indirectly demanding,
accepting, or receiving rents in excess of the maxi-
mum rents established by any regulation or order
heretofore or hereafter adopted pursuant to the
Housing and Rent Act of 1947, as heretofore or
hereafter amended, or from engaging in any other
acts or practices which violate the said Act or any
regulation or order adopted pursuant thereto.

It Is Further Ordered, Adjudged, and Decreed that the Defendants be and they are hereby required and directed to forthwith make restitution to the Plaintiff on behalf of the following named tenant, or in the alternative to the Plaintiff on its own behalf in the event said tenant cannot be located after appropriate effort, for the overcharges in the rental of the housing accommodations specified in this cause in the following sum, with interest at the rate provided by law.

Bruce A. Wilson.....\$975.00

It Is Further Ordered, Adjudged, and Decreed that the Plaintiff do have and recover of and from the Defendants the sum of Two Hundred Twenty-five Dollars (\$225.00), to be paid forthwith as treble damages for the wilful violations of the Act and Regulations involved in the aforesaid overcharges, with interest at the rate provided by law.

It Is Further Ordered, Adjudged, and Decreed that the Plaintiff do have and recover of and from the Defendants its costs in the amount of Forty-Two and 36/100 dollars (\$42.36), to be taxed by the Clerk and paid forthwith by the Defendants.

It Is Further Ordered, Adjudged, and Decreed that all payments made pursuant to this judgment shall be made to the Treasurer of the United States at the Litigation Section of the Office of the Hous-

ing Expediter, Room 712, Pacific Building, 821 Market Street, San Francisco 3, California.

Dated this 11th day of May, 1951.

/s/ OLIVER J. CARTER,
United States District Judge.

Lodged May 3, 1951.

Entered May 11, 1951.

[Endorsed]: Filed May 11, 1951.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Defendants, Donald McKittrick and Barbara McKittrick, hereby move the Court pursuant to Rule 59 of the Federal Rules of Civil Procedure for a new trial.

The Grounds upon which said motion is made are:

1. The Court has found that three monthly overcharges were wilfully demanded, accepted and received, which finding is contrary to the uncontroverted evidence that the parties had entered into a valid binding agreement to pay ceiling rentals only, which agreement would have been a defense to any action at law for the collection of an excessive amount, the emergency house and rent act to the contrary notwithstanding.

2. The Court made no findings as to the cir-

cumstances under which the premises in question were rented to Bruce A. and Beatrice Wilson, or as to the loss of money sustained by the defendants as a result of allowing said Wilsons to occupy the premises.

3. The Court made no findings as to the equities relative to restitution of overcharges collected more than a year prior to the commencement of the action, yet concluded "that the defendants have failed to satisfactorily show why the equitable power of this Court should not be exercised" notwithstanding the law placed upon the plaintiff the burden of showing that the equitable power should be exercised.

Dated May 21, 1951.

/s/ FRANCIS T. CORNISH,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 21, 1951.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Friday, the 8th day of June, in the year of our
Lord one thousand nine hundred and fifty-one.

Present: The Honorable Oliver J. Carter,
District Judge.

[Title of Cause.]

MINUTE ORDER

This case came on regularly this day for hearing
on motion for a new trial. Francis T. Cornish,
Esq., appeared on behalf of the defendant, and
William Spohn, Esq., was present for the plain-
tiff. After hearing respective counsel, the Court
Ordered that said motion be denied. Further Or-
dered that defendant be granted a stay of execution
until the time for appeal lapses.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Donald McKittrick and Barbara McKittrick, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 11th, 1951.

Dated July 9th, 1951.

/s/ FRANCIS T. CORNISH,
Attorney for Appellants, Donald McKittrick and
Barbara McKittrick.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

STATEMENT UNDER RULE 75(d) OF POINTS ON WHICH APPELLANTS IN- TEND TO RELY ON APPEAL

In presenting their appeal the defendants and appellants intend to rely upon the following points:

1. The Judgment, and the Findings of Fact, especially Findings of Fact Numbers 4, 5 and 9, are not supported by the evidence and are contrary to the uncontradicted evidence.

2. Finding Number 10 is contrary to the uncontradicted evidence offered at the trial.

3. That the uncontradicted evidence offered at

the trial showed that there were equitable reasons why restitution should not be ordered, and Conclusions of Law Numbers 4, 5, 6 and 8 are not supported by the evidence, and contrary to the uncontradicted evidence, and are legally unsound.

4. The Court based its judgment on the theory that restitution was a matter of right and that the burden was upon defendants and appellants to show why the equitable power of the court should not be exercised, whereas the decisions of the United States Supreme Court have established that the burden is upon the party asking restitution to show why the equitable power of the Court should be exercised.

5. The Judgment is erroneous in that it is not supported by any Findings of Fact to the effect that facts exist either requiring or justifying the exercise by the trial court of its equitable power to grant restitution.

Dated July 9th, 1951.

/s/ FRANCIS T. CORNISH,
Attorney for Defendants and Appellants, Donald
McKittrick and Barbara McKittrick.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO
DOCKET APPEAL

Pursuant to the provision of Rule 73(g) of the Federal Rules of Civil Procedure, it having been made to appear to the Court that through inadvertence a transcript pursuant to Rule 55(b) of the Federal Rules of Civil Procedure has not yet been filed, nor prepared by the stenographic reporter, and that notice of appeal was filed herein on the 9th day of July, 1951, and that it is not reasonably possible to complete the typing or filing of said transcript on or before the 18th day of August, 1951, and that in order to file said transcript the time provided for in the aforesaid Rule 73(g) ought to be enlarged, and good cause appearing therefor,

It Is Hereby Ordered that the time for docketing the record on appeal herein be, and the same is hereby, extended for an additional period of thirty days beyond the ordinary time provided, to wit, until the 17th day of September, 1951.

Dated August 9, 1951.

/s/ OLIVER J. CARTER,
District Judge.

[Endorsed]: Filed August 9, 1951.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD TO BE INCLUDED IN THE RECORD ON APPEAL

The defendants and appellants, Donald McKittrick and Barbara McKittrick, hereby designate the following to be contained in the record on appeal:

1. The Complaint.
2. The Answer of Defendants Donald McKittrick and Barbara McKittrick.
3. Plaintiff's Requests for Admissions.
4. Reply to Requests for Admission of Facts.
5. Plaintiff's Interrogatories.
6. Answer to Interrogatories served by mail October 11, 1950.
7. Reporter's Transcript, including all exhibits, of the testimony taken at the trial of the cause.
8. Order for Judgment.
9. The amended Order for Judgment.
10. The Findings of Fact and Conclusions of Law.
11. The Judgment.
12. The Memorandum of Costs and Disbursements, together with affidavit of service.
13. The Motion for a New Trial.
14. The notice of Time and Place of Hearing Motion for New Trial.
15. The Order Denying Motion for a New Trial.
16. The Notice of Appeal.
17. The statement under Rule 75(d) of points on which appellants intend to rely on appeal.

18. This designation of portions of the record to be included in record on appeal.

Dated July 9th, 1951.

/s/ FRANCIS T. CORNISH,
Attorney for Defendants and Appellants, Donald
McKittrick and Barbara McKittrick.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 9, 1951.

In the United States District Court for the North-
ern District of California, Southern Division
No. 29940

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DONALD McKITTRICK and BARBARA Mc-
KITTRICK,
Defendants.

Before: Hon. Oliver J. Carter, Judge.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the United States:

SIDNEY FEINBERG, ESQ., and
WILLIAM B. SPOHN, ESQ.,
Office of Housing Expediter.

For the Defendants and Appellants:

FRANCIS T. CORNISH, ESQ.

December 28, 1950—10:00 A.M.

The Clerk: United States versus McKittrick.

Mr. Spohn: Ready for the plaintiff.

The Court: Will counsel state appearance for the record, please?

Mr. Cornish: Francis T. Cornish, representing both defendants, your Honor.

The Court: Mr. Spohn, you are appearing for whom?

Mr. Spohn: William B. Spohn for the Government.

The Court: You may proceed.

Mr. Spohn: If the Court please, this matter involves a complaint under the Housing and Rent Act of 1947 as amended, growing out of the overt alleged overcharges in the rental of certain premises at 111 Oakmont Avenue, Piedmont, which are located within the Alameda County Defense Rental Area.

The overcharges in question occurred during the period July, 1946, to November, 1949, involving a \$300.00 bonus exacted by the defendants from the tenants at the outset of the tenancy, and monthly overcharges for the remaining months of the tenancy from July, 1947, through November of 1949, totaling \$1,000.00 in all, for which the plaintiff seeks restitution on behalf of the tenant, Bruce Wilson, and damages of \$225.00, representing treble the amount of the overcharges occurring within the one-year period preceding the institution of this action. [2*]

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: Are you sure of that figure, counsel, for the treble damages?

Mr. Spohn: Yes.

The Court: May I see the complaint here for a moment?

(The Clerk hands the complaint to the Court.)

The Court: I have examined this in a sort of cursory fashion, and in referring to the schedule which is attached to the complaint, I notice the amount there as stated, subject to treble damages, is \$75.00.

Mr. Spohn: Yes, that is the actual amount of the overcharges which is subject to treble, times three.

The Court: Three times seventy-five?

Mr. Spohn: Yes, sir, and that is spelled out in the prayer attached to the complaint.

The Court: Yes. Well, I just had an opportunity to examine this very cursorily.

Mr. Spohn: In other words, three overcharges of \$25.00 each occurring within that one-year period.

The Court: Yes, three times \$75.00—all right.

Mr. Spohn: The matter came to the attention of the Area Rent Office through an inquiry made by the tenant after he had removed from the premises in November, 1949. The efforts of the Area Rent Office to secure a refund from the defendant landlord proved unsuccessful over a period of months. The matter was accordingly referred to litigation

and this complaint [3] was filed and served in August of 1950. The pleadings followed in due course thereafter and may be summarized in this fashion:

In the answer, the defendants admitted being the landlords of the premises, but denied the other allegations item by item, and countered with a charge that the premises had been damaged by the tenants.

The Court: In a sum in excess of the——

Mr. Spohn: Yes, in a sum in excess of the total amount of restitution sought. The plaintiff therefore served request for admissions on behalf of the defendant which brought these admissions: First, that they admitted again that they are the landlords; secondly, they admitted that the name of the tenants and the period during which the tenants had occupied the premises; and they admitted that there had been no action brought by the tenants on their own behalf to recover the excess charges. However, they did deny the amounts collected from the tenants, and they did deny the applicable legal maximum rent for the premises.

Thereafter, the plaintiff served interrogatories on the defendants in order to focus the issues, or bring them within focus, and as a result the answer to the interrogatories brought forth an admission of the amounts collected from the tenants in the particulars set forth in our exhibit. In other words, dollarwise the defendants admitted that they had collected that much money, but they contended that, first, in July, 1946, [4] when the tenants went into

occupancy, that the tenants had paid \$300.00 voluntarily in order to induce the defendant landlords to forego their right as owners to occupy the premises, and that in July, 1947, after the first year's lease had expired, the tenants renewed such so-called inducement, paying at the rate of \$25.00 per month thereafter in excess of the \$110.00 which was specified in the written lease.

Thus, as a result of the pleadings, there are two issues to be determined: First, the legal maximum rent for the premises, which we are prepared to show by the records of the Area Rent Office, through a representative of that office; and, secondly, the facts of the rental arrangements, which are to be shown by the tenants Wilson and his wife.

I might say, your Honor, that as to the second, we could almost submit the other pleadings with citation to the law and the regulations; however, because of the curious circumstances as to the voluntary arrangement and what-not, I believe that the record would be more complete if the tenants on testimony were introduced in chief, and we are therefore prepared to introduce the testimony of the tenants, Bruce Wilson and his wife, Beatrice Wilson, who was with him at the time they rented, and who occupied the premises with him.

The Court: Mr. Cornish, would you proceed to state the theory upon which the defendant is proceeding in this case, and to give the Court such background as you deem advisable in [5] order to enable the Court to follow this matter with some degree of intelligence?

Mr. Cornish: I shall be glad to do so, your Honor.

Until I heard Mr. Spohn talk this morning, it never occurred to me—and I don't think that any one could, in reading the complaint, derive the inference from the complaint that they are seeking to recover for and on behalf of the tenant, the amount of the overcharge.

Now, there is nothing in the complaint that indicates that this is a suit brought by the Government for and on behalf of the tenant, nor do I know of any authority which permits the Government to bring such an action by and on behalf of the tenant.

The law, up until the time of the last amendment to the Federal Housing Act, gave the Government no right. There was a period of some two years that the Government had no right to bring an action to recover the overcharges. The action had to be brought by the tenant and he had to bring it within a year.

Now, more than a year has elapsed between the time that the last amendment went into effect and the time that this was filed. Consequently, the tenant was barred by the statute of limitations.

The Court: I notice now you raise that in your pleadings.

Mr. Spohn: Yes.

Mr. Cornish: Yes. [6]

The Court: I assume you are familiar with the line of cases that allow the Government to proceed in these actions on the theory that this is an equitable recovery.

Mr. Cornish: On the theory that there is a line of cases which allow the government to bring an action and to give the Court the power, sitting as a court of equity, to direct restitution. Now, there is no doubt about that, but that is not an action to recover for and on behalf of the tenants. That is an act of restitution, and we assumed that in such an action there are certain equitable defenses that are available that would not be available in a legal action brought by the tenant, or brought on behalf of the tenant for the recovery of the specific amount of money.

Now, this property belonged to Barbara McKittrick, and she and her husband had occupied it as their home. They were moving to Walnut Creek and went to the office of the Area Rent Control in order to get a ceiling rent established, so they were given the same story that is given by the Area Rent Control to all people who come in seeking to find out where they stand on a case of this sort. They are told that the Area Rent Control does not fix a rental until they are first rented. You go out and rent it and make your lease for whatever you think is fair, and then file your listing with us and we will fix the rent.

Now, depreciating the fact that once they had leased to [7] a tenant and gave the Area Rent Control jurisdiction to fix the rent, that they are frozen with a tenant in possession that they could not evict except to come back and occupy it themselves, and they had to accept that rent and no more than that amount of rent, these people were induced

to enter into this lease for \$150.00 a month, and then the Area Rent Control shaved the rent down to \$110.00. When the occupancy of that tenancy expired, the McKittricks were not in the position of owning this home in Piedmont, the rent for which the Government had frozen at \$110.00 per month, and they also had a nine-room home with three baths in Walnut Creek that was not subject to rent control, and which they could have rented easily at \$150.00 per month or more—there was no limit on it. The house was desirable and was readily rentable. So they proposed to move back into this house, and when the Wilsons came to them and desired to become tenants, they explained that they could not afford to pay the additional to absorb that loss of the \$40.00 per month that the Rent Control Office had cut them in freezing the rent, and that therefore they intended to move into it themselves.

So this proposition of paying the extra \$300.00 came from the tenants originally. They said, "Now, if you will just stay in Walnut Creek and won't move back into this house and will let us move in, we will pay—we won't pay \$150.00, but we will pay \$135.00, or we will give you an extra \$25.00 per month, and we will give it to you all in one check at the beginning of the [8] term."

Now, in the request for admissions, the request number four was a request that we admit that the items in said Exhibit A truthfully and correctly designate the rentals collected from said tenants.

Now, we denied that—and I would like to call

your Honor's attention to the fact that we had to deny that because, from July 13, 1946, to July 13, 1947, we did not collect \$300.00 rent. We collected one hundred, ten times twelve, plus three hundred. Now, whether that was an oversight on the part of the Area Rent Control, or the Government, in asking for that admission, whether they didn't realize that they hadn't put in the total amount of rent collected for that period or not, I don't know what the circumstance was, but it was necessary for us to deny it.

When we were asked in the interrogatory as to what rent had been collected—reported, in answer to the interrogatory, this \$300.00 that was paid in the inception as a bonus or inducement to the McKittricks not to move back into this house, but to allow it to be occupied by a tenant. Then, when the year's lease was up, again the McKittricks were prepared to rent their house in Walnut Creek and move back into Berkeley, because for a difference of \$40.00 per month, which it would automatically increase their living cost, and they were to rent the Piedmont house out instead of the Walnut Creek house, again [9] the proposition was made, "Well, we will pay you the same amount again, but it would be a convenience to us if, instead of paying three hundred at the beginning, we just add \$25.00 each month."

Now, leases were drawn for \$110.00 per month right along. We have those leases prepared to offer in evidence. The tenant was as much a partner to this transaction as the landlord. It was a tenants'

proposition, and the landlord has suffered from what, if forced to make restitution, because it would result in increasing the landlord's living expense by \$30.00 per month during all this time, when it could have just as well been saved.

Now, in addition to that, the tenant agreed to keep the property in repair. Instead of keeping the property in good condition, they took some of the furniture and the furnishings up into the attic and stored them up there, and made no provisions for the protection of the property against moths and dampness and as a result, as we have set forth, substantial damage to the furniture and furnishings in the house as a result of the neglect on the part of the tenant; and they even walked off with some of the property when they moved out, took it along with them. Now, all those things are material if this is an action in equity to ask for restitution.

Now, I don't feel that when a tenant goes in and does you a couple of thousand dollars damage, that it is becoming to the [10] government or becoming to the tenant or for anyone else to ask you to make restitution of an overcharge that amounts to only half of that amount, without, at the same time, making provision in some way for compensation for that damage.

Now, the tenants are not parties to this suit and this Court hasn't the jurisdiction to order the tenants to make such restitution to the landlord, and the government in bringing an equitable action has foreclosed us from the right to sue the tenant

in this proceeding, but all that is material, as I say, to the question of restitution.

Now, really, the only question that is involved in the case is the equitable defense against restitution, and so far as the \$75.00 is concerned—that is the three months overcharge—first, whether or not it should be trebled; and secondly, whether or not anything is due by reason of the tenant having damaged the landlord and having been indebted to the landlord greatly in excess of any overcharge in the rent.

Now, I think our evidence will disclose, and your Honor will be satisfied after hearing the evidence, that the damage to the McKittricks was greatly exceeded by any amount for which the government is asking judgment, for which government is asking judgment either for the Treasurer of the United States, or by way of the restitution, and it would be inequitable or unjust to give the government any kind of relief under these circumstances. [11]

Mr. Spohn: If the Court please, before offering any evidence, may I clear up one or two points that have been raised by counsel's opening statement?

The Court: Yes.

Mr. Spohn: In the first place, as to the surprise which he experienced upon hearing me say for the first time that we are seeking restitution on behalf of the tenants, may I call his attention to Paragraph II of the complaint which was filed in August of this year, in which the plaintiff asked that the defendant be ordered and directed to pay to

the Treasurer of the United States for and on behalf of all persons entitled thereto, a refund of all amounts, which amount is presently ascertained by the plaintiff to be the sum of a thousand dollars in excess of the lawful maximum rents which have been demanded from these tenants for and in connection with the use and occupancy of the housing accommodations hereinabove mentioned.

Mr. Cornish: Will you concede, Mr. Spohn, that your language was: "for and on behalf of the persons entitled thereto," and not, "for and on behalf of Bruce Wilson and wife"?

Mr. Spohn: I think that confession is beside the point. I think the language is clear. Certainly your tenants were advised, your clients were advised in the Area Rent Office during the lengthy efforts that we made by that Office between November of 1949, and the time this matter went to litigation in August, of exactly what was sought, restitution of the [12] overcharges to the tenants Wilson for the excess amounts. I think that is perfectly clear.

The Court: For the purposes here, the argument is immaterial insofar as this Court is concerned. The statute is plain that the government has the power to seek restitution. The cases are clear. The cases, there are so many of them on the records that it would be useless to attempt to cite them as authority, where restitution has been made under that statute, and that phase of the case creates no problem. I am interested in the legal theory of the equitable defense to this action which is in its nature an equitable action for restitution, and I

might be very frank to say to counsel that I haven't had that defense raised before—that is, to both counsel—and that I would like to have the authorities on that phase of the subject so that I might be able to pass on this question, with assistance of counsel on that matter.

Mr. Spohn: In immediate answer to that question, your Honor, the practice has been well established in cases brought under this statute, and the Emergency Price Control Act of 1942, of allowing equitable defenses to be interposed, even as against the tenants who are not parties in action. They are parties in interest inasmuch as they were the ones who were overcharged in the first instance, and they are the parties for whom restitution was sought by the government as incident to the enforcement action brought by the government in its own [13] name.

The Court: I believe that the primary authority for that practice may be found in the decision of the Supreme Court in *Porter versus The Warner Holding Corporation*. I can give you the citation later this morning. I am familiar with the subject.

Mr. Spohn: That was brought under the Emergency Price Control Act of 1942, as amended, and was one of the first occasions that the court took to discuss at some length the rent control features.

The Court: Well, it's your position at this point that the equitable defenses are proper?

Mr. Spohn: Yes. They may be interposed.

The Court: Yes.

Mr. Spohn: And for that reason, we took no exception to them.

The Court: And it is your theory here that this is an equity action, and in all the equitable defenses, the government stands in a different position, of course, than the tenants; but, nevertheless, this action here is seeking to bring restitution for an attempt——

Mr. Spohn: We bring it under the double heading of the two sections of the Act.

The Court: Of course, that is the theory upon which the statute is not made applicable to the government.

Mr. Spohn: That's right. [14]

So that the equitable phase of the action is drawn under Section 206, whereby we seek an injunction against further violations, and restitution of the overcharges. The legal aspect of the action, of course, is brought under Section 205, whereby we seek damages to the government for the violations.

The Court: Yes.

Mr. Spohn: And as your Honor has expressed, the limitation—the time limitation in Section 205 applies only to the damage count, and not to the restitution sought under the other Section, 206b.

The Court: That is my understanding of the cases now, at least. I confess that sometimes I may find something in the cases that is hard to reconcile with some of the other cases that I have seen on the subject.

Mr. Spohn: May I make one further observation, and that is this: That the curious story about

the inducement voluntarily offered by the tenants appeared for the first time in the answer to the interrogatories. It didn't appear during the seven or eight months' negotiations in the Area Rent Office. It didn't appear in the answer to the complaint; it didn't appear in the answer to the request for admissions; and not until the late date of October 30th did it appear, in the reply to the interrogatories.

The Court: Well, I suppose that will have to be adduced by evidence. [15]

Mr. Spohn: It will be, and we are prepared to meet it.

The Court: And I would suggest now, I think we have arrived now at the point where we know generally the points at issue, unless you have anything further.

Mr. Spohn: No, I have nothing further to say, and the first witness I should like to call is Cyril Saroyan.

CYRIL SAROYAN

called as a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Spohn:

Q. Would you state your name to the Court?

A. Cyril M. Saroyan.

Q. Spell your last name.

A. (Spelling): S-a-r-o-y-a-n.

The Court: Mr. Saroyan, spell your first name

The Witness (Spelling): C-y-r-i-l.

(Testimony of Cyril Saroyan.)

Q. (By Mr. Spohn): Mr. Saroyan, you are the rent attorney to the Alameda County Defense Rental Office?

A. I am.

Q. How long have you been connected with that office?

A. Approximately three and a half years.

Q. In your capacity as Area rent attorney, do you have access to the records of the Office?

A. I do.

Q. Have you consulted those records concerning the [16] registration statements for the premises at 111 Oakmont Avenue in Piedmont, California?

A. I have.

Q. Do you have with you the original registration statement?

A. I do.

Q. Do you also have a copy of it?

A. I also have a certified copy, an exact duplicate.

The Court: I take it this is 111 Piedmont Avenue in Oakland, is it?

Mr. Spohn: No, it is 111 Oakmont Avenue in Piedmont.

I am offering the original registration statement.

Mr. Cornish: You are not offering the whole thing?

Mr. Spohn: No, I am only offering the original registration statement with the adjustment noted on the rear, the same as the original side.

Mr. Cornish: Very well.

Mr. Spohn: With the Court's permission I should like to offer in evidence the certified copy of

(Testimony of Cyril Saroyan.)

the original registration statement which has been produced by the witness and which has been seen in court by counsel for the defendant.

The Court: It may be admitted into evidence as Plaintiff's Exhibit No. 1.

(A carbon copy of the registration of rental dwelling, office copy, was received in evidence and marked Plaintiff's Exhibit No. 1.) [17]

PLAINTIFF'S EXHIBIT NO. 1

GENERAL INSTRUCTIONS

The landlord is required to register separately each rental unit, whether occupied or vacant. A dwelling unit is a room or a group of rooms for which a single rent is paid. Complete Registration Statement in triplicate. (If not typewritten, be sure ink pressure is used so that both carbon copies are clear and distinct.) Use carbons, and mail or bring the three copies to the Area Rent Office. Extra sheets, in triplicate, for sections "D" & "E" if necessary. Maximum

3/1/42

Effective Date 7/1/42

UNITED STATES OF AMERICA
OFFICE OF TEMPORARY CONTROLS
OFFICE OF PRICE ADMINISTRATION
REGISTRATION OF RENTAL DWELLINGS
(TYPE OR PRINT PLAINLY - DO NOT FOLD)
(Do Not Use This Form for Hotels and Rooming Houses)

Form Approved Budget Bureau No. DR-1745
Form DD-U
AREA OFFICE
COPY

IDENTIFICATION

1. 111- Oakmont Ave.
Address of this rental dwelling unit

2. None

Apartment number or location 1st floor

3. Number of Rooms in unit being registered 2

4. Total Number of dwelling units in this structure

SECTION A. MAILING ADDRESS OF LANDLORD

Name of Landlord Mrs. Donald McKittrick

Name of Agent

Address Mail to:

Mrs. Donald McKittrick

5-246 - Ocean View Dr.

Oakland, Calif

City and State

SECTION B. MAILING ADDRESS OF TENANT

Name of Tenant Mr. & Mrs. P. Van Noyne

Address 111- Oakmont Ave.

City and State Piedmont, Calif

SECTION C. MAXIMUM RENT

Read carefully and fill in every item which applies to this dwelling unit.

Rent on "Maximum Rent date" \$ per week () per month ()

Not rented on "Maximum Rent date" but rented at any time during the two-month period ending on "Maximum Rent date".

Date last rented during that two-month period: 194

Rent on that date: \$ per week () per month ()

Not rented on "Maximum Rent date" nor at any time during the two-month period ending on "Maximum Rent date".

Check one box if applicable:

(a) Owner occupied or vacant on "Maximum Rent date" and during two-month period ending on "Maximum Rent date".

(b) Newly constructed without priority rating.

(c) Newly constructed with priority rating. (If checked, item 6 must also be filled in.)

Date first rented after "Maximum Rent date." Aug 6, 1944

Rent on that date: \$ 150.00 per week () per month ()

Dwelling unit made available by a change which resulted in an increase or decrease in the number of dwelling units after "Maximum Rent date."

Date first rented after such change: 194

Rent on that date: \$ per week () per month ()

Substantially changed after "Maximum Rent date," but before the "effective date." Check one box if applicable:

(a) From unfurnished to fully furnished.

(b) From fully furnished to unfurnished.

(c) By a major capital improvement AS DISTINGUISHED FROM ORDINARY REPAIR, REPLACEMENT AND MAINTENANCE.

Date first rented after such change: 194

Rent on that date: \$ per week () per month ()

Dwelling unit newly constructed with a priority rating from the United States or any agency thereof.

Rent approved by agency granting priority: \$ per week () per month ()

THE MAXIMUM RENT FOR THIS DWELLING UNIT IS:

\$ 150.00 per week () per month ()

Enter Maximum Rent in accordance with the following instructions:

(a) If only one of the above items applies to this dwelling unit the Maximum Rent is the rent entered for that item.

(b) If more than one of the above items apply to this dwelling unit the Maximum Rent is the rent reported for the most restrictive item.

(c) If item 6 applies to this dwelling unit the Maximum Rent is the lower of the rents entered in Items 1, 3 or 6.

Note: If any one of the items 3(b), 4 or 5 applies to this dwelling unit you must also fill in the information required in Section "E." The Rent Director may at any time order a decrease in the Maximum Rent determined under Items 3(a), 3(b), 4 or 5, on the grounds that the rent is higher than the rent generally prevailing for comparable housing accommodations on the "Maximum Rent date."

Orders issued by Rent Director dated April 3, 1945 established maximum rent is amount of

\$ per week () per month () ala A 5555-C

Section E. - See Note Section C. 7.

If item 3(b), 4 or 5 of Section C was filled in, set forth in specific detail the type and cost of:

(a) New construction (c) A change from unfurnished to fully furnished

(b) A change in the number of dwelling units (d) A major capital improvement

(b) - C. U.

SECTION D. EQUIPMENT AND SERVICES.

(Check the equipment and services included in the rent on "Maximum Rent date" or the most recent date you entered in Section C.) (ANSWER "YES" or "NO".)

1. EQUIPMENT YES NO

Furniture ☒ YES ☐ NO

Running Water ☒ YES ☐ NO

Hot Water ☒ YES ☐ NO

Flush Toilet ☒ YES ☐ NO

Bathroom ☒ YES ☐ NO

Central Heating ☒ YES ☐ NO

Harding Stove ☒ YES ☐ NO

Mech. Refrigerator ☒ YES ☐ NO

Electricity Installed: ☒ YES ☐ NO

Cooking Stove ☒ YES ☐ NO

If any equipment is shared, explain below:

2. SERVICES YES NO

Garage double ☒ YES ☐ NO

Heat or Heating Fuel ☒ YES ☐ NO

Cooking Fuel ☒ YES ☐ NO

Cold Water ☒ YES ☐ NO

Hot Water ☒ YES ☐ NO

Light ☒ YES ☐ NO

Ice or Refrigeration ☒ YES ☐ NO

Janitor Service ☒ YES ☐ NO

Garbage Disposal ☒ YES ☐ NO

Painting & Decorating ☒ YES ☐ NO

Interior Repairs ☒ YES ☐ NO

Exterior Repairs ☒ YES ☐ NO

List any other services: Radiator - oriented up

Suburb - Chicago

Joint table for guests

Are any equipment and services indicated above now included in the rent? Yes () No ()

If "No" you must also file Form D-2.

WARNING

The rent for this dwelling unit on and after the "effective date" can be no more than the Maximum Rent entered in Section C, Item 7, unless changed by order of the Rent Director (see Section C, Item 8).

A false statement on this form or an evasion or attempted evasion of the Maximum Rent Regulation may subject you to a \$5,000 fine or imprisonment for one year.

I HEREBY REPRESENT that all statements and entries given herein are true and correct.

PA R 3-2-4 V. KITTRICK

(Signature of Landlord or his Agent) (Date)

(Testimony of Cyril Saroyan.)

Mr. Spohn: May I call the Court's attention to some of the essentials on the statement?

Q. Mr. Saroyan, would you point out to the Court some of the essentials of this registration statement? In the first place, by whom was it made?

Mr. Cornish: Objected to on the grounds that the document speaks for itself.

The Court: Well, the document does speak for itself, but this testimony is in the nature of explanation.

Mr. Cornish: I assume counsel's theory is that the statement is so ambiguous that it needs explaining.

The Court: No, I don't think that is the theory. However, the document does speak for itself, counsel.

Mr. Spohn: Well, may I call it to your Honor's attention?

The Court: You can argue any part of it you desire.

Mr. Spohn: May I call your attention to this, your Honor? First to the facts appearing in the registration statement that it was made by Barbara McKittrick, filed in the Area Rent Office September 6, 1944.

The Court: I will permit the witness to testify as to the procedure in making these; as to the substance that is on the document itself, the objection is good, but as to the procedure, I will allow,

(Testimony of Cyril Saroyan.)

as to how this document is made. The witness may testify.

Q. (By Mr. Spohn): Will you testify, Mr. Saroyan, along the [18] line suggested by the Court in order to bring the way in which this registration statement was received and the action taken thereon by the Area Rent Office in following its receipt.

A. I will, sir.

The property was registered by Barbara McKittrick, September 6, 1944, and on the registration statement it is indicated that it had been owner-occupied previous to that time, and up and to August 6, 1944, at which time it was first rented to Mr. and Mrs. R. Van Duyne.

The Court: Mr. Saroyan, what I would like to know is, does the landlord make out the registration statement, or somebody on behalf of the landlord?

The Witness: It varies, I mean, a landlord can make it out, or it can be made out by someone at the Area Rent Office, that is, by one of the interviewers.

The Court: At the request of the landlord?

The Witness: Yes, and then it is signed and authenticated by the landlord.

The Court: The point is that the information disclosed on this is supplied by the landlord, is it not?

The Witness: That is correct.

The Court: All right.

The Witness: It indicates a house at 111 Oakmont Avenue, Piedmont, 8 rooms. Also there is a

(Testimony of Cyril Saroyan.)

little plus there, one in the attic and one in the basement. [19]

The Court: Well, the information there speaks for itself, I gather, but the thing that I was interested in was whether or not the instrument is either made out at the request of the owner, by the owner himself, or at his or her request.

Q. (By Mr. Spohn): Mr. Saroyan, will you explain to the Court what action was taken by the Area Rent Office following receipt of this original registration in September, 1944?

A. Proceedings were instituted thereafter to reduce the rental from the \$150.00 figure to \$110.00 per month.

Q. At whose instance were those proceedings initiated?

A. At the instance of the tenants in occupancy at that time, the Van Duynes.

Q. And what action was taken by the Area Rent Office?

A. The rental was reduced from \$150.00 per month to \$110.00 per month and that was done on April 3, 1945.

Q. On what basis was that reduction made?

A. On the basis of the section in the Rent Regulations which says that the rental, first rental, may be reduced on the basis of comparability; that is, reduced to a rental comparable to accommodations, to the type and size and services being supplied to the tenant.

Q. In other words, Mr. Saroyan, was this first

(Testimony of Cyril Saroyan.)

rent of \$150.00 reduced to \$110.00 by the Area Rent Office on the basis of comparability to similar accommodations? A. That is correct. [20]

Q. Now, how long did this \$110.00 rent remain in effect? Was there any action taken thereafter on it?

A. The \$110.00 rental remained in effect from April 3, 1945, to November 23, 1949.

Q. What change was made on November 23, 1949?

A. At which time the rent was increased from \$110.00 to \$130.00.

Q. By—— A. By the Area Rent Office.

Q. At whose instance?

A. At the instance of the landlord based upon a petition for an increase due to increased costs of maintenance, repair work, taxes, and other such items.

Q. Were there any—in your examination of the files, Mr. Saroyan, did you find any other record of adjustments or applications for adjustments on these premises?

A. Between the dates that I have mentioned, or subsequent?

Q. No, between the date of the reduction in April of 1945, and the petition filed by the landlord, November 23, 1949.

A. I have not. The rent remained at \$110.00 and there is no evidence of any application—pardon me, for any rental adjustment.

Q. During that period?

(Testimony of Cyril Saroyan.)

A. During that period.

Mr. Spohn: I have no further questions of Mr. Saroyan at [21] this point.

The Court: You may cross-examine.

Cross-Examination

By Mr. Cornish:

Q. Mr. Saroyan, may I take a look at that file you have been looking at? A. Yes.

Q. The whole thing.

A. All right. (Handing file to Mr. Cornish.)

Mr. Spohn: If the Court please, during this interval may I give the citation on that case? 328 U.S. 395, decided 1946.

The Court: Thank you.

Mr. Cornish, how much longer do you think it will take you to go through those documents?

Mr. Cornish: About five minutes.

The Court: Well, if you are going to require time, I think we should take the morning recess at this time for ten minutes so that you may complete the examination of the file, and then upon reconvening, you will be prepared to cross-examine this witness.

Mr. Cornish: Yes, your Honor, I will.

The Court: Recess.

(A ten-minute recess was taken.)

(Testimony of Cyril Saroyan.)

After Recess

The Court: Proceed with your cross-examination, Mr. Cornish. [22]

Cross-Examination

(Continued)

By Mr. Cornish:

Q. Mr. Saroyan, at the time that the order was made reducing the rent, the original tenants that applied for reduction were not in possession, were they?

A. I don't know. I could check the records to see.

Mr. Spohn: If your Honor please, I object to that as not being material to the issue here involved. This witness is on the stand and his testimony was directed particularly and solely to the legal maximum rent. Now, whether there was another tenant in possession at the time or not, is really not material to the action. He has testified as to what the registration shows.

The Court: He has testified as a custodian of the original documents, and the only thing is, that I want to ask you, Mr. Cornish, what is your theory of the materiality of this line of questioning?

Mr. Cornish: The theory of the materiality, your Honor, is this: That the petition was filed by the tenants in possession, and the determination was not made until after that tenant had gone out, and as far as the petition was concerned, it was a

(Testimony of Cyril Saroyan.)

moot question. The second tenant had come into possession and had been in possession for several months at the time that the Area Rent Control Office determined to reduce the rent.

The Court: Well, what difference would that make as to whether or not the tenant was in or out of possession, insofar [23] as this Court is concerned. Here is an administrative officer who made a decision. I don't think it is the function of this Court to go into the correctness or incorrectness of the administrative decision. If there was an error in that, the remedy of the statute is set forth in the statute, and it is not in this Court, and this is, in essence, a collateral attack upon the findings of the administrative official.

Mr. Cornish: We set up in the answer, your Honor, that there was valid order reducing the rent to \$110.00 per month, we set that up in our answer. Now, my point is that if a tenant asks for a reduction in the rent and it is not retroactive and does not affect that tenant's right, when that tenant goes out of possession and ceases to have an interest in the subject matter, the petition becomes moot and this witness has testified that the rent was reduced on the application of a tenant.

Now, at the time the rent was reduced, the tenant wasn't interested in the property, and there was no order made, any rent control that in any way affected the rights.

The Court: But the point is, is that erroneous or sound?

(Testimony of Cyril Saroyan.)

Mr. Spohn: If it were not jurisdictional, it would make no difference.

The Court: That's right.

Mr. Cornish: But if it were jurisdictional, if the petition under which the order was made was moot at the time—— [23-A]

The Court: I don't think that goes to the jurisdiction. Now let's go further. If there was an error, then there is a procedure for an appeal to a higher authority inside the administrative agency, and then finally for an appeal to the Supreme Court of the United States.

Mr. Cornish: That is correct, your Honor. I agree.

The Court: I have just finished a rather exhaustive study of that jurisdictional point, and I don't see how this would be material. This court's jurisdiction is the jurisdiction to determine whether or not there has been a violation of the Act. Now, the orders that are valid on their face coming from the rent control authorities, the administrative agency, cannot be attacked in this court if they are valid on their face. Now, this witness has testified——

Mr. Cornish: I appreciate that.

The Court (Continuing): ——that the order was made and that it was made at the request of the tenant. Now, whether or not that tenant was in possession at the time the order was made, seems to me to be immaterial here.

Mr. Cornish: All right.

(Testimony of Cyril Saroyan.)

The Court: I will sustain that objection and you can proceed to question further.

Q. (By Mr. Cornish): Could you show me the petition made by the tenant to reduce the rent?

Mr. Spohn: Again, your Honor, that strikes the same line [24] that has been held immaterial. What difference does it make, as your Honor has said? The agency did make a determination reducing the rent from that which had been first set by the landlord when the premises were first put into the rental market, and at that time the premises came within the jurisdiction of the federal government, and under the Price Control Act.

The Court: The point is—and I presume, Mr. Cornish, your point is that that does go to the jurisdiction——

Mr. Cornish: Certainly.

The Court (Continuing): ——of the administrative officer who is in charge here.

Mr. Cornish: Without an application made by someone to reduce, why, certainly they have no jurisdiction.

Mr. Spohn: Oh, that point, counsel, is wrong, because the agency itself, acting on its own initiative, could have made the determination.

Mr. Cornish: All right, if that is the fact, that witness could have so testified. It is admissible for the purpose of impeaching the witness.

The Court: Well, I will overrule this objection, and try to find out.

(Testimony of Cyril Saroyan.)

Q. (By Mr. Cornish): May I see the petition of the tenants to reduce the rent?

The Court: He asked if a petition was filed.

Mr. Cornish: I want to see the petition filed by the [25] tenants to reduce the rent.

The Witness: I don't know whether you would call that a petition. It is the tenants' copy of the registration, with a statement on the reverse side saying that he believes the rent to be too high at \$150.00.

Q. Would you detach that from the file, please?

Now, on September 19, 1944, the Area Rent Office had a standard form of printed petition for reduction of rents, did they not?

A. Yes, I believe they did.

Q. All right. Now, was such a form ever filled out by any tenant? In this case, I want to know whether there was such a form ever filled out that you know of? A. Not that I know of.

Q. Not that you know of?

A. We have just that——

Q. In other words, the document that you have just handed me, on the back of it, what you call the tenants' copy of the original listing——

A. No, the registration statement.

Q. (Continuing): ——the registration statement is the only document in the nature of a petition that was ever filed with the Area Rent Office for reduction of the rent? A. That is correct.

Mr. Spohn: I will object to any further line of [26] questioning of this nature. It is outside of

(Testimony of Cyril Saroyan.)

the scope of the direct examination, and as the Court has pointed out, an attempted collateral matter which this court can't——

Mr. Cornish: It is impeachment of the witness. He testified without any difficulty at all.

Mr. Spohn: To the issuance of an order, and that question is not in dispute.

The Court: Proceed.

Mr. Cornish: The witness testified without any difficulty. He named the tenant and said the petition of a particular tenant. Now, I have got a right to show that that statement is false, if I can.

The Court: You have a right to go into the matter.

Mr. Cornish: And I am offering in evidence this document, and ask that it be marked as Defendant's Exhibit A.

The Court: Well, it may be admitted in evidence.

Mr. Cornish: As being the only document in the nature of a petition for the reduction of rent that has ever been filed.

The Court: Admitted.

(A document entitled: Registration of Rental Dwelling, tenant copy, was received in evidence as Defendant's Exhibit A.)

No. 29940
Exhibit No. A
DEC 28 1958
C. W. Calhoun, Clerk

INSTRUCTIONS TO THE TENANT

1. ~~Dwelling~~ Landlord has submitted this Registration Statement for the dwelling unit you occupy. Read this form carefully.
2. If the statements on the other side are correct you may retain this form for your own use. If you disagree with any of the statements list your objections and return this copy to the local Area Rent Office within 15 days.



Furniture in bad state of disrepair, many articles broken

Dishes broken and insufficient - Tenant had to purchase new set

"Pool Table" has dozens of holes in felt ✓

"Ping Pong Table" in attic are boards set on ✓

packing boxes & bureau drawers

Open Attic - roof full of holes

Think rent should not be more than \$90.00 or \$100.00 per month - This dwelling would not rent for more than \$60.00 in ordinary times - we have been forced to pay \$150.00 after searching for 6 months for a place to live - Tenant on vital Defense Work

3. Unless otherwise notified by the Rent Director, you shall not pay more than the Maximum Rent as stated in Section C, Item 7, marked by an arrow (————→), regardless of any lease or other agreement.
4. You are entitled to and should be receiving the equipment and services reported as included in the rent in Section D.
5. You may not be evicted for refusal to pay more than the Maximum Rent or for complaint or any other action which is authorized under the Maximum Rent Regulation.
6. Any agreement by you to give up the benefit of any provision of the Maximum Rent Regulation is void.

NOTE: If you sublet all or any part of this dwelling unit you must also file a Registration Statement.

Opened 11/12/44

GENERAL INSTRUCTIONS

The landlord is required to register separately each rental dwelling unit, whether occupied or vacant. A dwelling unit is a room or a group of rooms for which a single rent is paid. Complete a Registration Statement in triplicate. If not typewritten, be sure double pressure is used so that both carbon copies are clear and distinct. Move carbons, and mail or bring the three copies to the Area Rent Office. The extra sheets, in triplicate, for sections "D" and "E" if necessary, maximum 1000 words.

UNITED STATES OF AMERICA
OFFICE OF PRICE ADMINISTRATION
REGISTRATION OF RENTAL DWELLINGS
(TYPE OR PRINT PLAINLY - DO NOT FOLD)
(Do Not Use This Form for Hotels and Rooming Houses)

Form DD-U

TENANT'S COPY

IDENTIFICATION

1. Address of this rental dwelling unit

Apartment number or location

3. Number of Rooms in unit being registered 8 + 1
4. Total Number of dwelling units in this structure

SECTION A. MAILING ADDRESS OF LANDLORD

Name of Landlord Mrs. Mary McKibbin
Name of Agent
Address Mail to:

SECTION B. MAILING ADDRESS OF TENANT

Name of Tenant Mrs. M. W. Van Dine
Address 111 Oakmont Ave.
City and State Richmond, Va.

SECTION C. MAXIMUM RENT

Rent carefully and fill in every item which applies to this dwelling unit.

1. Maximum Rent date: 11/12/44 per week () per month ()
2. Last rent paid during that two-month period: 1944

3. Rent on that date: 150.00 per week () per month ()
4. Rent on "Maximum Rent date" or at any time during the two-month period ending on "Maximum Rent date," but not later than "Maximum Rent date": 150.00 per week () per month ()

5. (a) Newly constructed or vacant on "Maximum Rent date" and during two month period ending on "Maximum Rent date."
(b) Newly constructed without priority rating.

6. Newly constructed with priority rating. (If checked, item 5 must also be filled in.)
7. Rent on that date: 150.00 per week () per month ()
8. Rent on that date: 150.00 per week () per month ()

9. Rent on that date: 150.00 per week () per month ()

10. (a) Fully unfurnished to fully furnished.
(b) From fully furnished to unfurnished.

11. By a major capital improvement AS DISTINGUISHED FROM ORDINARY REPAIR, REPLACEMENT OR MAINTENANCE

12. Rent on that date: 150.00 per week () per month ()

13. Rent on that date: 150.00 per week () per month ()

14. Rent on that date: 150.00 per week () per month ()

15. Rent on that date: 150.00 per week () per month ()

16. Rent on that date: 150.00 per week () per month ()

17. Rent on that date: 150.00 per week () per month ()

18. Rent on that date: 150.00 per week () per month ()

19. Rent on that date: 150.00 per week () per month ()

20. Rent on that date: 150.00 per week () per month ()

21. Rent on that date: 150.00 per week () per month ()

22. Rent on that date: 150.00 per week () per month ()

23. Rent on that date: 150.00 per week () per month ()

24. Rent on that date: 150.00 per week () per month ()

SECTION D. EQUIPMENT AND SERVICES

(Check the equipment and services included in the rent on "Maximum Rent date" or the most recent date shown in Section C.)

1. EQUIPMENT	YES	NO
Furniture	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Running Water	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Hot Water	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Flush Toilet	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Bathroom	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Central Heating	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Heating Stove	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Mech. Refrigerator	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Electricity Included	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Cooking Stove	<input checked="" type="checkbox"/>	<input type="checkbox"/>
If any equipment is shared, explain below:		

2. SERVICES

YES	NO
Garage	<input checked="" type="checkbox"/>
Heat or Heating Fuel	<input checked="" type="checkbox"/>
Cooking Fuel	<input checked="" type="checkbox"/>
Cold Water	<input checked="" type="checkbox"/>
Hot Water	<input checked="" type="checkbox"/>
Light	<input checked="" type="checkbox"/>
Ice or Refrigeration	<input checked="" type="checkbox"/>
Janitor Service	<input checked="" type="checkbox"/>
Garbage Disposal	<input checked="" type="checkbox"/>
Painting & Decorating	<input checked="" type="checkbox"/>
Interior Repairs	<input checked="" type="checkbox"/>
Exterior Repairs	<input checked="" type="checkbox"/>
List any other services:	

Are all equipment and services indicated above now included in the rent? Yes () No ()
If "No," you must also file Form DD-102.

Section E. - See Note Section C. 7

If item 2(b), 4 or 8 of Section C was filled in, set forth in specific detail the type and cost of:
New construction (c) A change from unfurnished to fully furnished
A change in the number of dwelling units (d) A major capital improvement

WARNING

The rent for this dwelling unit on and after the "effective date" can be no more than the Maximum Rent entered in Section C, Item 1, unless changed by order of the Rent Director (see Section C, Item 1).

A false statement on this form or an evasion or attempted evasion of the Maximum Rent Regulation may subject you to a \$5,000 fine or imprisonment for one year.

I HEREBY REPRESENT that all statements and entries given herein are true and correct.

(Signature of Landlord or his Agent)

(Testimony of Cyril Saroyan.)

Mr. Spohn: If your Honor please, may I ask permission to have a certified copy substituted for the original, inasmuch as this has been taken from——

The Court: It may be granted. You may withdraw the [27] original and substitute a certified copy in its place.

Any further questions?

Q. (By Mr. Cornish): Now, this rent was increased from \$110.00 to \$130.00, was it not?

A. That's right.

Q. And when was it increased?

A. On February 3, 1950, effective as of November 23, 1949.

Q. Now, the Wilsons moved out November 13, 1949, did they not? A. I don't know.

Q. You have no knowledge of that?

A. No.

Q. Was there any, or is there anything in your file which indicates that there was any substantial change in the rental value of this property between the 13th of November, 1949, and the 23rd of November, 1949?

A. Well, what were those dates, again?

Q. The 13th of November, 1949, and the 23rd of November, 1949.

Mr. Spohn: I object to that as calling for the conclusion and opinion of the witness.

Mr. Cornish: I am asking if his records show.

The Court: Just a moment, Mr. Spohn, there

(Testimony of Cyril Saroyan.)

hasn't been any statement of appearance in the record of your associate counsel.

Mr. Spohn: R. C. Yount, associated with me in the presentation of the government case. [28]

The Court: So that the record will be clear, do the records show anything, Mr. Saroyan?

The Witness: The records merely show a petition filed by the landlord on November 23, 1949, asking for a rental adjustment, with a lot of facts and figures.

Q. (By Mr. Cornish): And the rent was increased to \$130.00 from \$110.00?

A. That is correct.

Q. Is there anything in your file, Mr. Saroyan, that indicates that during the last three months that the Wilsons occupied that property, that \$130.00 would have been an unreasonable rent to pay?

Mr. Spohn: It's beyond the point.

Mr. Cornish: It is material to the matter of restitution, your Honor, regardless. There is a technical rule that the rent is frozen at a certain figure and that it is unlawful to collect more, but at the same time they are asking for restitution.

Now, restitution must be determined, in part, upon whether or not there has been an unreasonable rental charge. If these people have received value and have actually received \$135.00 worth of rental accommodations, there is no reason for making any restitution.

The Court: The objection is sustained because

(Testimony of Cyril Saroyan.)

that goes clearly into the question of the jurisdiction of the Area Rent [29] Control Office or officer, and the remedy is set forth in the statute, and this court is not going into that phrase of the matter.

Now, if there are any equitable defenses to the relationship between the tenants and the landlord, then this court will hear those, but insofar as the proceedings that the government has taken, this court simply is not going to have a complete judicial review of the administrative proceedings before that board.

Mr. Cornish: No, I am not seeking a complete review of the administrative proceedings. My point is that the government has filed this action seeking equitable relief. They have come before this Court as a court of equity, and they are, in substance, saying that during the period which the law prohibits this tenant from recovering anything, that this tenant has been so imposed on that it would be unjust and it would be inequitable to permit the defendants to keep the difference between \$110.00 and \$135.00.

Now, it is our contention that if a reasonable rent, regardless of what the frozen rent was, if a reasonable rent was \$130.00 or \$135.00 per month, it would be unreasonable to compel these landlords to make restitution of \$25.00 per month if a fair rent would be \$20.00 in excess of what the O.P.A. fixed. It is not a matter of reviewing the validity of the decisions of the Area Rent Office; it's a mat-

(Testimony of Cyril Saroyan.)

ter of determining what is fair to make [30] restitution.

The Court: That is just the question on fixing the rents, the rent ceilings, in these cases. That is the function of the Area Rent Control officer; and besides that, this question calls for an opinion and conclusion that this witness is not entitled to give, and on that additional ground, I am going to sustain the objection.

Mr. Cornish: I am asking him if there is anything in his file that indicates it; that's all.

Mr. Yount: I will object to that as incompetent and immaterial.

The Court: Just a moment. The matter has been objected to.

Mr. Cornish: And ask him if there is anything in the file that calls for his opinion.

The Court: You have had a chance to look at the file.

Mr. Cornish: May I put it this way?

Q. Is it not a fact, Mr. Saroyan, that there is nothing in the file that would throw any light upon the question as to whether or not any reasonable rent during any of this period was in excess of or less than or equal to the rent of \$110.00 per month which was fixed——

Mr. Yount: Objected to on the same ground. The order was issued. Whatever is in the file cannot change the force and effect of the order.

Mr. Cornish: I would like to be heard on that before your [31] Honor rules.

(Testimony of Cyril Saroyan.)

The Court: You may.

Mr. Cornish: This is an action in equity which is brought by the federal government, and I am attempting to show that this is an action which has been ill-considered by the federal government, that if the federal government had gone into the facts of this case, they would have determined that it would have been unjust and inequitable to ask for restitution to be made if they had inquired into all the facts, and I think I have the right to show that he made no inquiry into the facts, but has proceeded on the cold assumption that there was a frozen rent of \$110.00; that there was rent paid of \$135.00, therefore there should be a payment made to the tenant, but unfortunately the statute of limitations bars that recovery, so we are not going to call this an action for the recovery of rents, an action of restitution, so we get by the statute of limitations. This isn't an action for restitution at all. The government isn't seeking to do equity for anybody; they are seeking to collect by subterfuge something that they wouldn't be able——

Mr. Spohn: I object most strenuously as a point of privilege the attack that is being made on the government's counsel.

The Court: Mr. Spohn——

Just a moment, now, gentlemen, we are not going to get into a heated argument on this point. I am going to rule on the objection and I am going to sustain the objection for the [32] same reasons that have been heretofore given. This field of question-

(Testimony of Cyril Saroyan.)

ing, or the area in which this question goes to, is the area that is covered by the administrative procedure.

Now, I am going to say to counsel, if you have any specific record that you wish to refer to in this file, and you desire to have the witness identify, and which record is material to these proceedings and you desire to offer it into evidence after identifying it with this witness, you may do so. But to ask this witness to give his opinion as to whether there is anything in this record that does this, or if there is anything in the record that does that, I am going to sustain the objections to it.

Now, you have had the chance to examine the file——

Mr. Cornish: Yes, your Honor.

The Court (Continuing) ——which he has testified from. If there is any specific document that you desire to refer to, and have the witness identify as being a document that is regularly kept by the government in this proceedings, and if you can show its materiality, you may proceed on that basis.

Mr. Cornish: All right.

Mr. Spohn: May I point out one thing, that this witness has already testified in his testimony in chief that there is nothing in the file, no record whatsoever, in the Area Rent Office, in this file here——

The Court: I am aware of that. [33]

Mr. Spohn (Continuing): ——showing any action by the defendants between the time that they

(Testimony of Cyril Saroyan.)

filed the original registration in September of 1944, until they filed the petition for adjustment on November 23, 1949. His testimony is there. What more can questioning bring out?

The Court: I am familiar with that record, Mr. Spohn, and you can argue it when the time for argument comes, and these objections, I hope, will be made with a statement of the grounds for your objection and the theory behind it.

Now, I sustain the objection and the ruling is going to stand.

Now, proceed, Mr. Cornish.

Mr. Cornish: Now, is it your Honor's ruling—just so I understand the Court, because I don't want to appear to be trying to get matters before the court that you have ruled against me on.

The Court: Yes.

Mr. Cornish: Do I understand that on the issue of restitution, that I cannot show anything which has a tendency to impeach the findings of the Area Rent Control that the \$110.00 was the proper rent?

The Court: That's right.

Mr. Cornish: All right. In other words, your Honor is ruling that so far as the issue of restitution is concerned, independent of attacking the validity—in other words, let's [34] say we come into court and we admit that we have overcharged; we admit that there is a valid maximum rent ceiling of \$110.00 per month, and we admit that we have collected \$25.00 per month in excess of that

(Testimony of Cyril Saroyan.)

and we admit it has been paid as rent, no defense on that standpoint at all——

The Court: Yes.

Mr. Cornish: Is it your Honor's contention that where the statute has run and they can't collect the money——

The Court: You mean where a period of time has expired?

Mr. Cornish: The one year's statute has expired, and they cannot collect that rent back, although we are wrong, they have lost their rights, that when they come in the back door——

The Court: That is under an action for damages by the government?

Mr. Cornish: Correct—is it your Honor's contention that when they do come in the back door and ask for restitution, that they may stand strictly upon the findings of the Area Rent Control and we are not privileged to challenge them and show that those findings are unreasonable for the purpose of showing that restitution should not be based upon an unreasonable determination?

The Court: That is exactly my theory, without a showing, that you have exhausted your administrative remedies.

Mr. Cornish: All right. In other words, now your Honor said I could refer to any specific document? [35]

The Court: Yes.

Mr. Cornish: There are two records in there where some field investigator has gone out and he

(Testimony of Cyril Saroyan.)

has listed on the record the rent charged for what in his opinion was comparable housing and he has apparently based his determination that \$110.00 per month is reasonable for this house, based upon the rent charged for what he calls comparable housing.

Now, I agree with your Honor that if we wanted to attack the validity of the order fixing the rent at \$110.00 per month, our remedy is administrative and has long since gone by the board, but would your Honor rule, if I should ask him about that, on the issue of restitution, that we are not privileged——

The Court: I will answer your question. I will anticipate your question and say that whether it is for restitution or whether it is an action for damages, I am not going to go behind the findings of the rent control officer as to whether or not they are regular on their face, and the record is here before us and the witness has testified and has introduced a certified copy of the order of the Rent Control Office, so that I am not going to permit questioning to go back of that.

Now, as to your dealings with the tenant, I am going to permit testimony on that to go to the equitable issues, but I am not going to sit here and as a court of equity review the proceedings of the Area Rent Control Office.

Mr. Cornish: May I then—for the purposes of the record, [36] I will drop this line of examination.

The Court: You may make your offer.

Mr. Cornish: I offer to prove that the deter-

(Testimony of Cyril Saroyan.)

mination made—and this is only on the issue of restitution——

The Court: I understand.

Mr. Cornish (Continuing): ——not on the issue raised by the pleading, but on the issue of restitution, we offer to prove that the determination by the Area Rent Control, that the maximum rent was \$110.00 per month, and their order reducing it from \$150.00 to \$110.00 was based upon erroneous findings of fact, unjust and unfair, and partial findings of fact; and to show that the reasonable rental at all times, from the time of the order of reduction up until the present time would have been \$135.00 per month, or in excess thereof.

The Court: You may make your offer, and the request to prove that, the matter set forth in your offer, is denied.

Mr. Cornish: No further questions.

Mr. Spohn: I have no further questions of this witness.

The Court: You are excused, Mr. Saroyan.

(Witness excused.)

Mr. Spohn: As the next witness for the plaintiff, I would like to call Mr. Bruce A. Wilson.

BRUCE A. WILSON

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows: [37]

Direct Examination

By Mr. Spohn:

Q. Would you state your name to the Court for the record? A. Bruce A. Wilson.

Q. What is your present address, Mr. Wilson?

A. 26 Glen Alpine Road, Piedmont.

Q. What is your occupation?

A. I am in the wholesale jobbing business.

Q. In San Francisco? A. Yes, sir.

Q. Were you formerly a tenant at 111 Oakmont Avenue, Piedmont? A. That is correct.

Q. Do you recall what period you were a tenant at those premises? Do you remember when you went there in the first place?

A. From July of 1946 until the 7th of November, 1949.

Q. From whom did you rent those premises? Do you recall? By that I mean, who was the landlord from whom you rented the premises on Oakmont Avenue?

A. Mr. and Mrs. McKittrick.

Q. Mr. and Mrs. Donald McKittrick, the defendants here? A. That's right.

Q. Do you recall how you first learned that those premises were available for rent?

A. Mrs. Wilson was making a canvass of the real estate offices and got in contact with it through

(Testimony of Bruce A. Wilson.)

a woman who was an agent for [38] it, W. A. Radford Company, in Oakland.

Q. They are real estate agents?

A. I believe.

Q. Mrs. Wilson is here today?

A. Yes, sir.

Q. Were you with Mrs. Wilson when she first interviewed the defendants, or when she rented the premises? A. Yes.

Q. Was there anyone else present?

A. No.

Q. Do you recall about when you and Mrs. Wilson rented the premises, shortly before you moved in, in July of 1946?

A. Well, I can identify it by the checks.

Q. Now, it was shortly before you moved in?

A. Yes, a few days.

Q. Now, when and where did you and Mrs. Wilson interview or talk with the defendants, Mr. and Mrs. McKittrick, about renting the premises at 111 Oakmont Avenue?

A. Oh, on two occasions, both in Walnut Creek.

Q. Where in Walnut Creek?

A. At their home.

Q. At the McKittrick home?

A. That is correct.

Q. Now, was there anyone present in addition to yourself, your wife, and the two defendants?

A. For a short time, the McKittrick's [39] daughter.

Q. The McKittrick's daughter. Now, do you

(Testimony of Bruce A. Wilson.)

recall the negotiations that you had for the rental of the premises on that occasion?

A. I believe so.

Q. Do you recall asking what the rent was for the premises? A. Yes.

Q. And do you recall what the answer was?

A. Yes.

Q. And who gave you the answer?

A. I am not sure whether it was Mr. or Mrs. McKittrick.

Q. And what did they tell you the rent was on the premises?

A. They said the rent had been \$110.00 and that they had a telephone authority from the OPA, which I believe was the agency at that time, to raise the rent to \$135.00.

Q. Now, did they then charge you \$135.00?

A. No, they asked that the difference between \$110.00 and \$135.00 be paid in a single check, so that they could go through the necessary paper work that would finally bring about the rent control.

Q. Now, did you make the payment in the fashion that they asked? A. Yes.

Q. How did you pay that, by cash or check?

A. In two checks, one for \$300.00, and the check for \$110.00.

Q. Do you have that check for \$300.00? [40]

A. Yes, I do.

Q. May I see it? (Handing the check to Mr. Spohn.) A. That is the three hundred.

(Testimony of Bruce A. Wilson.)

Q. Yes.

Mr. Spohn: I should like to offer in evidence as Plaintiff's Exhibit next in order the check for \$300.00, dated July 11, 1946, to the order of B. J. McKittrick, drawn by Bruce A. Wilson, on the American National Bank and Trust Company of Chicago, which has just been offered by the witness and seen by the defendants and their counsel.

The Court: The check will be admitted into evidence as Plaintiff's Exhibit 2.

(A check in the amount of \$300.00, dated July 11, 1946, was received in evidence and marked Plaintiff's Exhibit No. 2.)

PLAINTIFF'S EXHIBIT No. 2

[Check]

Bruce A. Wilson
208 S. La Salle St.

No. 305

Chicago, Ill., July 11, 1946.

Pay to the

Order of	D. S. McKittrick	\$300.00
----------	------------------	----------

Three Hundred and 00/100.....Dollars

To

American National Bank
and Trust Co.
of Chicago

/s/ BRUCE A. WILSON

(Testimony of Bruce A. Wilson.)

[Back of Check]

[Endorsed]:

/s/ D. S. McKITTRICK

[Stamped]: S. F. Clearing House, Berkeley Main
Office 90-41

Prior endorsements guaranteed.

American Trust Co., S. F., 11-24, July
18, 1946.

[Stamped]: Paid through Chicago Clearing House
July 19, 1946.

The First National Bank of Chicago
2-1

Q. (By Mr. Spohn): Now, about the rental, Mr. Wilson, I believe you have testified that there was this \$300.00 payment, and then there was a separate payment of rent; is that correct?

A. Yes, sir.

Q. Now, did you pay the separate—or make the separate payment at the same time?

A. Yes, sir.

Q. Did you make that by check, also?

A. Yes, sir.

Q. Do you have that cancelled check?

A. Yes, sir. [41]

(Handing a check to Mr. Spohn.)

The Court: Counsel, in order to get this matter correct now, as I understand it, Mr. Cornish, you

(Testimony of Bruce A. Wilson.)

admit that in your pleadings, I take it, and in the interrogatories that followed it, that a check for \$300.00 was delivered, and a separate check for the amount of the rent was also delivered?

Mr. Cornish: Yes, that is admitted.

The Court: And you don't have to produce these instruments to establish that fact. That is a check in the amount of how much?

Mr. Spohn: One hundred ten.

The Court: For the monthly rent?

Mr. Spohn: Yes, and what I wanted to do was to show the separate payment of the \$300.00 in one transaction, and then the monthly payments in checks for one hundred ten.

The Court: You will stipulate to that?

Mr. Cornish: What is the date of that check?

Mr. Spohn: July 11, 1946, the same date as the other check. In fact, if you will notice, it bears the next number from the check book. In other words, the one hundred ten dollar check was dated July 11, 1946, No. 304. The \$300.00 check dated the same day, No. 305, from the tenants' check book.

Mr. Cornish: Yes.

The Court: You will stipulate to that, will you not, Mr. Cornish? [42]

Mr. Cornish: Sure.

The Court: Then, it is not necessary to admit the documents into evidence.

Q. (By Mr. Spohn): Mr. Wilson, did you enter into any written agreements with the defendants for the rental? A. Yes, we signed a lease.

(Testimony of Bruce A. Wilson.)

Q. Do you have that lease with you?

A. I do.

The Court: Well, now, a lease is annexed to the interrogatories in the exhibit. Is this the original copy?

Mr. Spohn: I want to make certain that it is.

The Court: All right, you may. It is annexed to the answer to the interrogatories.

Mr. Cornish: This is not exactly a copy.

Mr. Spohn: Is this the lease that you received from the tenants?

The Court: If there is any problem about it, put it into evidence.

Mr. Cornish: I will say this, your Honor, that the lease was executed in triplicate, and there are certain minor deviations in the two copies.

The Court: You may point them out, but this witness can identify this document.

Mr. Cornish: There is no doubt, your Honor, but that that is an original. We don't doubt that that is an original. [43]

Mr. Spohn: May I offer in evidence as Plaintiff's Exhibit next in order——

The Court: Plaintiff's Exhibit No. 3.

Mr. Spohn (Continuing): ——a copy of the lease produced by the tenants?

The Court: It may be admitted as Plaintiff's Exhibit No. 3.

(A lease of premises was received in evidence and marked Plaintiff's Exhibit No. 3.)

(Testimony of Bruce A. Wilson.)

PLAINTIFF'S EXHIBIT No. 3

[A lease of premises similar to Exhibit A attached to Answers to Interrogatories filed Oct. 28, 1950. See pages 27 to 30 of this printed record. The following renewal is an addition to the original lease in Plaintiff's Exhibit No. 3.]

July 13, 1947.

This lease is hereby renewed on the same terms as contained above from July 13, 1947, to July 13, 1948.

/s/ D. S. McKITTRICK,

/s/ BRUCE A. WILSON.

Filed December 28, 1950.

The Court: Now, then, Mr. Cornish, if there are any material differences that you desire to point out, you may do so on cross-examination; or if you can get together and stipulate on it, why, that is satisfactory with the court if you believe that the differences are material.

Mr. Spohn: May I ask the witness one question?

Q. Did you make any changes on this copy of the lease that you received from the defendants?

A. I wrote at the end of the lease which continued it from July the 13th, 1947, to July 13, 1948.

Q. That is the renewal?

(Testimony of Bruce A. Wilson.)

A. That is in my own handwriting; that is correct.

Q. Did you make any other changes?

A. No, none whatever.

Q. Well, then, I will get to that point in the line of questioning.

Under this lease, Mr. Wilson, I notice that it provides [44] a term of one year, commencing July 13, 1946, to July 13, 1947, for a rent in the sum of \$1,320.00 payable monthly in advance on the 15th of each month. There are certain other provisions written, in longhand, and a written statement to the effect, "Receipt is hereby acknowledged of \$110.00, which constitutes the first month's rent under this lease."

Mr. Spohn: I believe it has been stipulated, or if not, I will ask the tenant:

Q. Did you pay the monthly rent of \$110.00 each and every month during that year?

A. Successively, yes, sir.

Mr. Spohn: And it has been stipulated that that is a fact?

Mr. Cornish: Yes.

The Court: That is the admitted fact in the pleadings.

Mr. Cornish: That he paid one hundred ten a month for each of the months in this term. In fact, that is where we differ from your statement that you claim your schedule included all the payments of rent made, and admitted those payments of \$110.00 a month.

(Testimony of Bruce A. Wilson.)

Mr. Spohn: Then, there is no question about the payment of the \$110.00 a month during this year?

The Court: No.

Mr. Spohn: All right.

Q. I notice on the copy of the lease which is in evidence for the plaintiff, a hand-written statement dated July 13, 1947, [45] reading:

“This lease is hereby renewed on the same terms as contained above, from July 13, 1947, to July 13, 1949.”

With two signatures, one of which appears to be D. S. McKittrick, and the other, Bruce A. Wilson. I ask you whether or not that is the statement that you, just a moment ago, mentioned as having made?

A. Yes.

Q. And that is your signature?

A. That is correct.

Q. Was that signature by D. S. McKittrick made in your presence? A. No.

Q. It was not? (Showing document to Mr. Cornish.)

The Court: Well, now, since there is a problem there, Mr. Cornish, do you stipulate that that is Mr. McKittrick's signature?

Mr. Cornish: Yes, your Honor.

Q. (By Mr. Spohn): Now, during the months commencing July 13, 1947, under the renewal of the lease, what rent did you pay?

A. One hundred thirty-five.

Q. Did you pay \$135.00 each and every month?

A. Uh-huh.

(Testimony of Bruce A. Wilson.)

Mr. Spohn: Is that stipulated? [46]

Mr. Cornish: We so answered in our interrogatory, didn't we? You understand my stipulation is that he paid \$135.00. I don't stipulate he paid that as rental.

The Court: I will accept that qualification of your stipulation. He paid \$135.00 every month. For whatever purpose it was, is a question to be determined yet.

Mr. Cornish: That's right.

Q. (By Mr. Spohn): Now, going back, there was a change, was there not, Mr. Wilson, from one hundred ten, during the first year, to \$135.00 during the second year?

A. I assumed that in paying the three hundred, that the rent control thing had gone through, and automatically at the end of the year I started the payment of \$135.00 by check per month.

Q. Was there any discussion about the difference of paying \$110.00 as against \$135.00?

A. None whatsoever.

Q. Did you discuss that matter with the defendants at the time you entered into the renewal of the lease? A. No.

Q. Then, is it your testimony that beginning with the second year and thereafter, you simply paid \$135.00? A. That is correct.

Q. Was there any agreement or any statement ever prepared in writing that \$300 a month payment that you made in the first place, that \$300.00 lump sum payment? A. No, sir. [47]

(Testimony of Bruce A. Wilson.)

Q. Was there ever any written statement providing for a change of monthly payments from one hundred ten to one hundred thirty-five?

A. No.

Q. Was there ever any discussion on paying one hundred thirty-five rather than one hundred ten plus a \$300.00 as you did in the first instance?

A. None whatsoever.

Q. Have you received any refund from the defendants for any of the amounts that you paid them during the period that you were in occupancy of the premises?

A. No.

Q. Have you brought any private lawsuit on your own behalf to recover any of that money?

A. No, the only thing we did was, after we had left the house and had found that this condition existed, we wrote a letter asking them if they would care to make any restitution, and it was never replied to.

Q. When was that, after you had left the tenancy?

A. Yes.

Mr. Spohn: I have no further questions at this time of Mr. Wilson.

The Court: You may start your cross-examination. You may start to cross-examine now, Mr. Cornish. I presume you expect to take some period of time. [48]

Mr. Cornish: I think it will take a little time, your Honor. I would just as soon start. I can ask several questions before lunch, your Honor.

(Testimony of Bruce A. Wilson.)

The Court: Well, if you desire to, go ahead, proceed.

Cross-Examination

By Mr. Cornish:

Q. Mr. Wilson, you say you wrote a letter to Mr. McKittrick? A. I beg your pardon?

Q. You say you wrote a letter to Mr. McKittrick after you moved out? A. Yes, I believe so.

Q. Do you have a copy of it?

A. No, I don't.

Q. Do you remember what you said in that letter?

A. Only that we had learned that the rent had been excessive, and that we asked if they would care to do anything about it.

Q. How long after you moved out of the property did you write that letter?

A. I don't recall.

Q. You took a water color painting with you that belonged to the McKittricks, didn't you?

A. I have no knowledge of any paintings of any kind.

Q. Do you recall a water color painting that was in a frame? A. No, I do not.

Q. And you took the picture and left the [49] frame?

A. I have no recollection whatsoever of it.

Q. You took an etching that belonged to the McKittricks at the time you moved out, didn't you?

A. I never saw paintings or etchings of any

(Testimony of Bruce A. Wilson.)

kind that belonged to them. As a matter of fact, the furnishings of their house was stored in the attic and at no time did we ever touch them from the time we moved in until we moved out, with minor exceptions.

Q. What condition were the furnishings in the attic at the time you moved out?

A. I don't know.

Q. You made no investigation of them?

A. No, sir, nor did we when we went in.

Q. You moved some of the things up into the attic, didn't you, while you were there?

A. A few pieces that were downstairs in the first floor of the house, yes.

Q. And what condition were they when you moved out?

A. We moved the dining room rug which seemed to have some value, and actually sent it out and got it cleaned and put it in the attic.

Q. And what condition were those items when you left the house, the ones that you put up in the attic?

A. I don't know.

Q. You made no investigation to find out? [50]

A. There was on the rug that we put in the attic.

Q. Is that the letter that you are referring to, the letter that you wrote to Mr. McKittrick? (Handing a letter to the witness.)

A. That is correct; that is the letter.

Q. Now, when did you learn that the Rent Con-

(Testimony of Bruce A. Wilson.)

trol Board had not authorized an advance in the rent?

A. Some real estate man called us shortly after we had left the house and asked what we paid in rental, and I told him \$135.00, and he said, "Well, did you know that was \$110.00 property?" And I said, "No, I did not know that." With which we went down to the Rent Control Office and talked to Mr. Chambers to ask him what was the situation, after having written that letter.

Q. Now, when did you move out?

A. On the 7th of November, 1949.

Q. The 7th of November, 1949?

A. That is correct.

Q. And this letter that you have identified was written 7 days later? A. I presume so.

Q. How long after you moved out did this real estate man call you to talk about the rent?

A. Within a couple or three days, if I remember rightly.

Q. Do you remember the name of the real estate man? [51]

A. No, he didn't identify himself and I didn't ask him.

Q. Isn't it a fact that that inquiry from the real estate man was made after the 23rd of November, 1949?

A. No—I am pretty sure of that, because I had no knowledge that the condition existed.

Q. You knew all the time that you were in this

(Testimony of Bruce A. Wilson.)

property that there was a rent ceiling of \$110.00 per month, didn't you?

A. No, I knew at the beginning when we went into the property that they said that the rent ceiling was \$110.00, and that the OPA—that the OPA had given them a telephone approval for an advance in rent.

Q. All right. Now, this lease that you have identified provides for \$110.00 per month, doesn't it?

A. That's right.

Q. (Handing a document to the witness.): And you endorsed on the bottom of that, the statement:

“This lease is renewed on the same terms for one year.”

Or in substance to that, did you not?

A. I did.

Q. All right, now, why did you pay \$135.00 per month when your lease provides for \$110.00?

A. Well, the renewal of the lease, I didn't read it.

Q. You didn't read it?

A. Not the second time around, no. [52]

Q. Didn't you ever read it before you signed it?

A. I read it at the beginning, yes.

Q. And you knew it provided for \$110.00, didn't you? A. That's right, I did.

Q. All right, then, when it was renewed for a period of a year, you knew one hundred ten was provided at that time?

A. I don't believe I gave it a thought.

(Testimony of Bruce A. Wilson.)

Q. You knew you had made out a check for three hundred for advance payment of rent?

A. And we immediately started to pay the \$135.00, and I have the checks as evidence.

Q. And you knew that during all the year before, you were writing checks for one hundred ten?

A. Plus the \$300.00.

Q. You knew that each month you were writing a check for \$110.00, didn't you?

A. Of course.

Q. And you knew the lease provided for \$110.00?

A. Yes.

Q. All right. Now, then, isn't it a fact that at the time Mr. McKittrick signed that extension, that he told you that he wouldn't sign it unless you did pay an extra \$25.00?

A. There was no conversation whatsoever on the signing of the lease the second time. It was made out and mailed—it was mailed out and mailed [53] back.

Q. Isn't it a fact that you came to Mr. McKittrick and asked him for the extension for a year?

A. No, sir, it is not a fact.

Mr. Cornish: I would like to offer this letter in evidence, your Honor, before I get too far afield.

The Court: You may. It may be offered into evidence as Defendants' Exhibit B. Is that correct, Mr. Clerk?

The Clerk: That is correct, your Honor: Defendants' Exhibit B.

(Testimony of Bruce A. Wilson.)

(A letter dated November 14, 1949, was received in evidence and marked Defendants' Exhibit B.)

DEFENDANTS' EXHIBIT B

November 14, 1949

Mrs. Donald McKittrick
Box 39
Walnut Creek, Calif.

Dear Mrs. McKittrick:

We have just learned that the Rent Control Board did not authorize an advance in rent in the figure of \$110.00 quoted to us three years ago on the premises at 111 Oakmont Ave., Piedmont, California. We have also learned that at no time was there any consideration given to an advancement of of this rent. It was our understanding that this advance from \$110.00 to \$135.00 that we paid for three years was a routine matter that was then in the process of being completed.

We would prefer not to introduce any difficulties into the matter of the \$1,000.00 so would ask that you kindly return this overpayment to us by December 1st.

Yours very truly,

/s/ BRUCE A. WILSON.

#27 Glen Alpine Road
Piedmont, California

Filed December 28, 1950. [54-A]

(Testimony of Bruce A. Wilson.)

Q. (By Mr. Cornish): Now, were you introduced at the McKittricks? A. No.

Q. You went out to see them at Walnut Creek?

A. At the instigation of a real estate woman.

Q. The real estate woman told you where they lived? A. Yes.

Q. And they had never met you before you came to their house? A. That is correct.

Q. And you requested them to rent you the house? A. Yes.

Q. They didn't look for you?

A. No; they had listed it with the real estate people.

Q. How many times did you go out to their house before you [54] signed a lease?

A. Twice, I believe.

Q. How far apart were those two times?

A. One night.

Q. One night apart? A. I think so.

Q. You are sure it wasn't two nights?

A. It might have been.

Q. You said that you were told that the OPA had increased the rent to one hundred thirty-five?

A. I was told that they had approval by telephone from the OPA for an increase.

Q. All right. Now, the lease was first prepared to pay \$135.00 per month rent, wasn't it?

A. No, I don't believe so. I never saw any such document.

Q. That signature, Bruce A. Wilson, that I show you, is that your signature? A. Yes, sir.

(Testimony of Bruce A. Wilson.)

Q. And the signature Beatrice S. Wilson, is that your signature?

A. That is my wife's signature.

Q. Your wife's signature? A. Yes, sir.

Q. Now, I call your attention to the last three lines on that same page and ask you if you ever saw those before? [55]

A. I apparently did. I don't recall it, however. This is my initial signature on the side.

Q. Then, isn't it a fact that the first lease that was prepared was prepared to provide for rent at \$135.00 per month? A. I would presume so.

Q. All right. At the time you signed the lease, you signed a lease in duplicate, didn't you?

A. Yes.

Q. And this change down at the bottom on this page here where the figures one hundred thirty-five are stricken out and the figures one hundred ten written above, you initialed? A. I did.

Q. You saw that, then, didn't you?

A. I must have.

Q. When you read it? A. I must have.

Q. Now, on the face of this same document, the words sixteen hundred twenty, the sixteen is crossed out and a thirteen is written above. You also initialed that change, didn't you?

A. That is my initial, yes.

Q. All right, and isn't it a fact that the lease, when it was first prepared and shown to you, was drawn to require the payment of \$135 per month

(Testimony of Bruce A. Wilson.)

rent instead of \$110? A. I can't answer that.

Q. Isn't it a fact that, before you signed that lease, both [56] Mr. and Mrs. McKittrick advised you that they would not rent the property because they had found that the Area Rent Control would not let them charge more than \$110.00 per month rent? A. I don't recall any such statement.

Q. Why did you pay \$300.00 on a tenancy in advance and sign a lease to pay one hundred ten per month? A. Why did I?

Q. Yes.

A. For the reason that they *that* it would take some time to have the paper work accomplished in the O.P.A. and we would pay the difference in cash, which I agreed to do, and did.

Q. Didn't they tell you that the rent was \$110.00 per month when you moved in? A. No, sir.

Q. What did they tell you they were going to accomplish through the O.P.A.?

A. They said they had approval by telephone to raise the rent, and I didn't question the figure.

Q. All right, raise the rent from what figure to what figure?

A. I presumed from one hundred ten to one hundred thirty-five. That is what we paid.

Q. What did they tell you? They told you about asking the Area Rent Control for an approval. What did they tell you?

A. They told us that—no, that the O.P.A., if I remember rightly, had given them telephone approval in advance. [57]

(Testimony of Bruce A. Wilson.)

Q. Telephone approval of what?

A. Of an advance in rent.

Q. Advance from what to what?

A. I presumed——

Q. I am not asking you what you presume; I am asking you what you remember they told you?

The Court: Your best recollection.

The Witness: To one hundred thirty-five.

The Court: From one hundred ten to one hundred thirty-five?

The Witness: Yes.

The Court: Now, counsel, we have arrived at the noon hour. You may continue your cross-examination after noon.

Mr. Cornish: Can you, before adjournment, your Honor, have this document marked for identification?

The Court: You may have it marked for identification if there is no objection, and you want to introduce it into evidence, you may introduce it. You don't want to offer it at the moment?

Mr. Cornish: That is right.

The Court: All right, then, the document will be admitted and marked for identification as defendants' Exhibit C.

The Clerk: Defendants' Exhibit C for identification.

(The lease heretofore referred to was marked Defendants' Exhibit C for identification.) [58]

The Court: All right, then, at this time we will take our noon recess until the hour of 2:00 p.m.

(Testimony of Bruce A. Wilson.)

(A recess was taken until 2:00 o'clock [59] p.m.)

Afternoon Session—2:00 P.M.

(Bruce A. Wilson resumed the witness stand, having been previously duly sworn, and testified further as follows.)

Cross-Examination
(Continued)

The Clerk: United States versus McKittrick, et al., for trial.

Mr. Cornish: Ready.

Q. Mr. Wilson, showing you plaintiff's Exhibit 3, I call your attention to what is written on the top, written upside down on the top of page 2, July 13, and I will call your attention to this part. This is written upside down on top of the page, July, 1947, "This lease is hereby renewed on the same terms as contained above, from July 13, 1947, to July 13, 1948. You wrote that in your handwriting? A. Yes, sir.

Q. When did you write it?

A. Presumably July 13.

Q. I am not asking you "presumably." I am asking you when you wrote it?

A. It's dated July 13.

Q. When did you write it?

A. I don't know.

Q. Do you have any idea? A. No, sir.

(Testimony of Bruce A. Wilson.)

Q. Was it on, before, or after July 13? [60]

A. I don't know.

Q. You have no recollection?

A. No, sir. I dated it here, that's the only——

Q. May I refresh your recollection, Mr. Wilson, and ask you if it isn't a fact that you wrote that there three months after July 13, 1947?

A. I don't remember.

Q. Do you remember where you wrote it?

A. I presume I wrote it in my home.

Q. I don't care what you presume; I want to know if you remember where you wrote it.

A. No.

Q. To refresh your recollection, you wrote it at your home in Mr. McKittrick's presence, did you not?

A. Not to my knowledge.

Q. You don't recall that? A. No, sir.

Q. Isn't it a fact that at the time you wrote that, that you had already sent Mr. McKittrick three checks of \$135.00 each?

A. I don't remember that.

Q. You don't remember? A. No, sir.

Q. Would you say that you hadn't sent in three checks for one hundred thirty-five each when you wrote that?

A. I wouldn't say. [61]

Q. You can't say? A. No, sir.

Q. When did you put the date of July 13, 1947, at the top of that?

A. I don't know.

Q. Did you put it there before or after Mr. McKittrick signed it?

A. I don't know.

(Testimony of Bruce A. Wilson.)

Q. Isn't it a fact that you put it there after he signed it? A. No, I don't believe so.

Q. I am now showing you, Mr. Wilson, Defendants' Exhibit C for identification, and call your attention to a similar statement that appears on that, written upside down on the top of page 2, and ask you if the signature, "Bruce A. Wilson," is your signature? A. Yes, it is.

Q. And if the signature, "B. S. Wilson," is your wife's signature? A. So it appears.

Q. And it is a fact, is it not, that D. McKittrick and Barbara McKittrick signed their names in your presence? A. No, it is not so.

Q. They did not?

A. They did not sign it in my presence.

Q. Now, I call your attention to the fact that there is no [62] date on that. Can you tell me the date on which you signed the rider that is on Defendants' Exhibit C, for identification?

A. No, I have no knowledge of it.

Q. Were both the statement on the lease which you hold in your left hand, and on Defendants' Exhibit C for identification signed at the same time? A. No, I don't believe so.

Q. You do not? A. I do not.

Q. Would you say they were not signed at the same time?

A. To the best of my knowledge they were not signed at the same time.

Q. How far apart were they signed?

A. I don't know.

(Testimony of Bruce A. Wilson.)

Q. Were they signed on the same day?

A. I don't know.

Mr. Yount: I don't wish to interrupt counsel on cross-examination, but I can't see the relevancy of these questions. The fact that the amount of money was paid is admitted. Now, if he wants to cross-examine on circumstances relating to the original rental, that is one thing; but to go into these immaterial and irrelevant details when it is admitted that the money was paid, I object to on the grounds of relevancy and materiality, for lack of the same.

The Court: Objection overruled. Proceed. [63]

Q. (By Mr. Cornish): Were they signed on the same day? A. I don't believe so.

Q. You don't believe so. All right, were they signed on successive days?

A. I don't believe that, either.

Q. How many days apart were they signed?

A. I have no knowledge of it.

Q. What makes you think they weren't signed at the same time?

A. For the reason that I mailed it.

Q. You mailed it?

A. I mailed the lease with the codicil written on them.

Q. You mailed them to them for signature?

A. That's right.

The Court: Mr. Wilson, you mean the extension terms; not codicils.

(Testimony of Bruce A. Wilson.)

The Witness: Yes—I beg your pardon.

Q. (By Mr. Cornish): All right. Now, which one of those did you mail to them?

A. Well, the only one I had was the copy that was in my possession.

Q. And that is——

A. And I believe this one that you gave me first is the one that——

The Court: The witness is referring to—let me see the copy—now referring to Plaintiff's Exhibit No. 3. [64]

The Witness: I believe this is a copy of the lease which we had.

Q. (By Mr. Cornish): Now, had you signed your name, Bruce A. Wilson, on the extension on Plaintiff's Exhibit 3 at the time that you mailed it to Mr. McKittrick?

A. That, I wouldn't remember.

Q. You don't remember that? A. No.

Q. All right. Which one of these did you sign first, if they were signed at different times?

A. I don't know; I would think this one.

Q. You mean, Plaintiff's Exhibit 3?

A. I would believe so; I am not sure.

Q. And do you recall where you signed the extension on Plaintiff's Exhibit 3?

A. No, probably in my home at my desk.

Q. Do you recall where you signed the extension written on Defendants' Exhibit C for identification?

A. No, I don't.

(Testimony of Bruce A. Wilson.)

Q. Did you and your wife sign at the same time? A. I don't remember.

Q. Was Mr. McKittrick present when you signed? A. No, there was no one present.

Q. Are you sure of that?

A. Yes, sir. [65]

Q. Now, you don't recall how many rent checks of \$135.00 a month you had sent at the time that your signature was affixed to those two extensions?

A. No, I do not.

Q. You don't even recall whether you had sent any checks? A. No, I don't.

Q. You are positive now you are giving us your best recollection? A. Yes, sir.

Q. You are not concealing anything?

A. I don't believe so.

Q. All right. Now, Mr. Wilson, going back to the time when you first signed this lease, first made this agreement with the McKittricks, you came to their house on two occasions?

A. Are you asking me?

Q. Is that not a fact? A. Yes.

Q. And on the first occasion no papers were signed?

A. I don't believe so. That's right.

Q. And did Mr. McKittrick tell you, or Mrs. McKittrick, either one of them, on the first occasion, that they would rent you the house?

A. No, they did not.

Q. Do you recall what the last thing you said in that conversation was as you left the house? [66]

(Testimony of Bruce A. Wilson.)

A. Do I recall? No.

Q. Isn't it a fact, Mr. Wilson, that the last thing you said was, "Please, Mr. McKittirek, rent us your house"? A. I don't remember that.

Q. You don't remember that? A. No.

Q. Would you say you didn't make that statement?

A. Yes, because that's not my formal way of talking.

Q. Then, on the second occasion, did you make out the check the first day you came?

A. No, sir.

Q. Will you explain to me, Mr. Wilson, why your check is dated the 11th of June, and the lease is dated the 11th of July—and the lease is dated the 13th of July?

A. No, I don't know that, except that if my memory serves, the lease was to be prepared and sent to us.

Q. You didn't sign the lease, then, in Mr. McKittrick's presence?

A. I can't recall. I don't know whether that first lease was signed in their presence or not.

Q. You do recall, however, initialing certain changes? A. Wait a minute, may I—

The Court: Yes, you may.

The Witness: I believe that we did sign a lease, which I would assume to be the one that you showed me this morning, which [67] is the one that has the crossed-out marks. I believe that was signed on

(Testimony of Bruce A. Wilson.)

the second day or evening, rather, that we saw the McKittricks, but later, a copy to me was substituted without that same information in it, or, that is, without the corrections made on it.

Q. (By Mr. Cornish): In other words, to straighten out the record, Mr. Wilson, you signed Defendants' Exhibit C for identification and——

A. I think so.

Q. (Continuing): ——and Plaintiff's Exhibit 3 was mailed to you afterwards?

A. That's to the best of my recollection, yes.

Q. Then, at the time that you left the conference when the lease was signed, you didn't have a copy of the lease in your pocket? A. No, sir.

Q. Now, was this lease dated the same day that you signed it? A. That, I don't know.

Q. You didn't check the date of the 13th?

A. No, I did not.

Q. I call your attention to what appears to have been a correction on the 13th, at the top of page 1 of Defendants' Exhibit C for identification, and also in two places at the bottom. A. Yes.

Q. And I will ask you if you know when those corrections were [68] made?

A. I have no idea. They were not in my writing and I had nothing to do with them.

Q. Were they made before or after you signed it? A. I don't know.

Q. How long after you signed the lease was it before you moved in?

A. Perhaps Mrs. Wilson can answer it; I can't.

(Testimony of Bruce A. Wilson.)

Q. You don't recall? A. No.

The Court: Do you know when you moved in?

The Witness: Not specifically, by date, no.

Q. (By Mr. Cornish): Did you make out the check for \$300.00 before or after you signed the lease?

A. I don't know. We made the check out, the two checks out, the second time we saw them.

Q. The second time?

A. That's right. Now, whether or not that was before or after the lease was signed—I would believe it would be before.

Q. Were those checks dated the day you made them out? A. I suppose so.

Q. Were they or weren't they?

A. I wouldn't have any way of knowing. You don't usually check a check other than the date you are writing it.

Q. That is why I am asking you if it was dated the day you wrote it. [69]

A. I can't answer it.

Q. Now, I am calling your attention to Plaintiff's Exhibit dated July 11, and Plaintiff's Exhibit 3—Defendants' Exhibit C for identification, which is dated July 13, and I will ask you which of those dates is correct as the date upon which you signed the lease and mailed out the check, July 11, or July 13?

A. I can't answer it. I am rather positive that I made the check out on July 11. As to what the date the lease was signed, I have no way of knowing.

(Testimony of Bruce A. Wilson.)

Q. But you didn't make out the check before the day you signed the lease, you know that?

A. I beg your pardon?

Q. You did not make the check out the same day on a date previous to the day you signed the lease?

The Court: Do you understand the question?

The Witness: Yes, I do. This involves the question of which lease.

Q. (By Mr. Cornish): The one you are holding in your hand, Defendants' C for identification.

A. I am of the impression that this original lease with its corrections was signed at the same time—evening that we signed the check.

The Court: That is the best recollection you have?

The Witness: Yes, but my copy of the lease was not signed [70] until later. How much later, I don't know.

Q. (By Mr. Cornish): Isn't it a fact, Mr. Wilson, that you deliberately dated the check two days before the day it was written? A. No.

Q. That is not a fact? A. No, sir.

Q. Then, if there is any discrepancy in the dates, it was purely accidental in either the mistake in the day of the lease and mistake in the date of the check, whichever it might be, when it was delivered? A. No, sir.

Q. Now, when did you first hear that there was a ceiling price fixed by the Area Rent Control of

(Testimony of Bruce A. Wilson.)

\$110.00 a month on the property at 111 Oakmont Avenue?

A. Some few days after we moved out and were telephoned by a real estate man.

Q. That's the first time you heard of it?

A. First time I heard that the paper work which was indicated to us in 1946 had not been completed.

Q. What did you think, Mr. Wilson, month after month, when you were making out checks for \$135.00 rent and the lease called for one hundred ten?

A. I don't know that I ever gave that any conscious thought, but I assumed that the paper work that was represented to us [71] would be done—had been done—and that the legal rent was \$135.00.

Q. You knew that your lease called for \$110.00, didn't you? A. Yes, that's right.

Q. And you knew it was renewed on the same terms? A. That is correct.

Q. All right. Now, why did you send a check for \$135.00 when you had signed an agreement to pay one hundred ten?

A. Because we had been paying one hundred thirty-five right along.

Q. You hadn't given Mr. McKittrick one check for \$135.00 at the time this lease was extended, had you?

A. That is correct. I had given him 12 checks for one hundred ten, and one check for three hundred.

Q. Now, you told me a minute ago you didn't

(Testimony of Bruce A. Wilson.)

remember whether you had given him any checks for one hundred thirty-five. Now, you say you don't know. Which is correct?

The Court: Just a moment, counsel, I don't recall that that is his testimony; and the question is argumentative in its form.

Mr. Cornish: All right.

Q. How many checks for \$135.00 per month—how many checks for \$135.00 had you given Mr. McKittrick when the extension agreement was signed on those two leases?

A. That is the same question I said I couldn't answer. [72]

Q. You couldn't answer?

A. That is correct.

Q. Now, then, you just said about half a minute ago that you had only given him 12 checks for one hundred ten, and nothing more except the \$300.00 check. Now, which is correct, that you can't answer it, or that you hadn't?

A. I don't understand the question.

Q. Had you ever given Mr. McKittrick a check for \$135.00 before the extension agreement was signed?

A. I have repeatedly said I did not.

Q. You did not. All right. You knew when the extension agreement was signed that the lease called for \$110.00?

A. Yes, I knew that.

Q. Now, why did you make out a check for \$135.00?

A. Because we had, in effect, been paying that

(Testimony of Bruce A. Wilson.)

consistently and that I assumed that, as I say, the paper work on the basis of their representation to us that they had been granted an increase by the O.P.A. and that it had gone through. I didn't ask questions about it.

Q. You made no inquiry at all?

A. Not the least.

Q. You were perfectly willing to pay an extra 25 months' rent?

A. I don't believe—I am not perfectly willing to pay anything. What I did was to pay a continuance of what we had been paying on what we assumed to be a representation that the paper [73] work had been completed.

Q. You had paid \$300.00 in one chunk; you had never paid one hundred thirty-five, had you?

A. I think that is quibbling.

Q. Had you?

A. No, we paid \$110.00 plus three hundred.

Q. You didn't pay another three hundred when you renewed the lease for another year?

A. No, I simply added it to the one hundred ten and paid it in that form.

Q. Did you discuss the adding of that \$25.00 to the one hundred ten each month with Mr. or Mrs. McKittrick before you did it?

A. No, sir.

Q. Did they ever ask you to add it?

A. No, sir.

Q. In other words, nobody ever asked you for any more than \$110.00 a month rent all the while

(Testimony of Bruce A. Wilson.)

you were there except for the original \$300.00 check? A. No, no one ever asked that.

Q. And you never objected to paying it?

A. No, on the assumption that this O.P.A. ruling had been completed.

Q. Now, you know nothing about the condition of any of the furniture up in the attic, either what was in there before you [74] moved in or what you put up there yourself at the time you left?

A. That is essentially correct.

Mr. Cornish: I have no further questions.

The Court: And further examination?

Mr. Spohn: Just one question.

Redirect Examination

By Mr. Spohn:

Q. When you first rented the place in July of 1946, Mr. Wilson, what rent was specified for the premises? A. \$135.00 per month.

Q. And you have previously testified as to the circumstances under which you paid that in two separate amounts? A. That's right.

Q. There was a check for \$300.00?

A. That's right.

Q. Plus 12 monthly checks of one hundred ten?

A. As we understood it, we were to pay the \$300.00, anticipating that the paper work would be completed following this so-called phone conversation of authority to increase, and that until such time as the paper was done, it would be \$110.00 per

(Testimony of Bruce A. Wilson.)

month, and we were to pay the premium of \$300.00 which would be legalized by the paper work form. Now, that is my best memory of it.

Q. One further question: You have been shown two lease forms, one is Plaintiff's Exhibit 3, which you had in your possession, and the other is Defendants' C for identification, which was [75] produced this morning by counsel for the defendants?

A. Yes.

Q. And on the latter one, that is, the one that the defendants produced, there are some changes made as to the amount of rent, which bear two initials, one of which you have identified as your own?

A. That is correct.

Q. Do you recall any discussion at the time those changes were made and you initialed the form?

A. No, I don't exactly, except the situation which I have just explained on the basis of your present question—your last question—but in detail, no, sir.

Q. Okay.

Mr. Spohn: I have no further questions.

The Court: Any further cross-examination?

Mr. Cornish: No, your Honor.

The Court: That is all, Mr. Wilson. You may step down.

(Witness excused.)

Mr. Spohn: May I speak to Mr. Wilson a moment?

The Court: Yes, you may.

Mr. Spohn: I would like to call Mrs. Beatrice Wilson.

The Court: All right.

BEATRICE WILSON

called as a witness in behalf of the plaintiff, having been duly sworn, testified as follows: [76]

Direct Examination

By Mr. Spohn:

Q. Would you state your name to the Court?

The Court: Before you start questioning Mrs. Wilson, Mr. Spohn, in order to see that the record is accurate, Mr. Wilson has testified as to the \$300.00 payment, and then the \$110.00 monthly payments for \$713.46 through 7/13/47.

Mr. Spohn: There were 12 monthly payments.

The Court: Twelve monthly payments of \$110.00, and then for the payment of \$135.00 a month, for the extension period, which I understood was one year, the first extension.

Mr. Spohn: That's right and thereafter.

The Court: Now, that would take us through 7/13/48?

Mr. Spohn: Yes.

The Court: Item II of the complaint in the schedule attached to the complaint carries us down to 11/13. Now, rather than recalling Mr. Wilson to the witness stand, since counsel has already stipulated that the payments from 7/13/47 through the extension period of one year had been paid at the rate of \$135.00 a month, is it also stipulated that,

(Testimony of Beatrice Wilson.)

to and including 11/13/49, that \$135.00 a month was paid?

Mr. Cornish: Up to the time that Mr. Wilson vacated the premises, your Honor, it is stipulated that each month he sent a check for \$135.00.

The Court: All right. He vacated, I understand, on November 7? [77]

Mr. Cornish: It is stipulated that the defendants received the money and cashed the check.

The Court: All right, then, the record is complete.

Q. (By Mr. Spohn): Mrs. Wilson, you are the wife of Bruce Wilson who just finished testifying, and you were with him in the various transactions that he related concerning the rental of the premises at 111 Oakmont Avenue? A. Yes.

Q. During the course of his testimony, at the outset, in response to a question as to how you and he learned of the availability of this house for rental, I believe your husband testified that you had been canvassing the market and you were informed by a real estate agent that this house was available? A. Yes.

Q. Is that correct? A. That's right.

Q. Do you recall any of the circumstances of that happening? By that, I mean, do you recall the real estate agent from whom you received this information? A. Oh, yes.

Q. What was the name?

A. I don't remember her name, but it was the Radford Company.

(Testimony of Beatrice Wilson.)

Q. The Radford Company?

A. Yes, it's at Leslie Street, Lakeshore and Trestle Glen.

Q. Where? [78] A. In Oakland.

Q. In Oakland?

A. Yes. I paid them a commission.

Q. Oh, you did? A. Oh, yes.

Q. Do you have the check for that?

A. Mr. Wilson has it.

Q. Is this the check to which you referred?

A. I think so; I have to get my glasses. Yes, indeed.

Mr. Spohn: I offer in evidence as Plaintiff's Exhibit next in order, a check dated July 30, 1946, drawn on the American National Bank and Trust Company of Chicago, to the order of W. A. Radford Company, in the amount of \$66.00, signed by Beatrice S. Wilson.

Mr. Cornish: To which we object on the ground that it is incompetent, irrelevant and immaterial, and not within the issues of the case, and not binding upon the defendants.

Mr. Spohn: If your Honor please, I think I can establish the relevancy of the exhibit.

The Court: Well——

Mr. Spohn: It deals with the transaction that is at issue here.

Mr. Cornish: I think your Honor should sustain my objection until he establishes the relevancy, and not place on me the burden of making a motion

(Testimony of Beatrice Wilson.)

to strike it if he fails to do it. [79]

The Court: Well, what is the binding effect upon these defendants here?

Mr. Spohn: It runs directly, if your Honor please, to the curious contention made that these tenants induced the defendants to forego their privileges as owners, from occupying the premises. In other words, this indicates that the house was on the rental market and was so found by the tenants, and the check indicates the payment for the representation performed by the real estate agent, and that will go directly to the willful issue here on which we predicate our claim to damages.

The Court: Well——

Mr. Cornish: May it please your Honor——

The Court (Continuing): ——just a moment, Mr. Cornish. I think at the moment, your objection is sound. I am going to sustain it at this time. I think, Mr. Spohn, you are anticipating a defense that hasn't been made. In other words, it may be proper rebuttal, but it is not——

Mr. Cornish: In fairness to your Honor, I will state that our proof will disclose that this house was on the rental market and that it was listed with various real estate brokers, among others, the Radford Company for \$110.00 per month rent. Now, what arrangements these people made with Radford, we know nothing about. Whether the Radford Company earned a commission or whether he paid one or didn't is nothing to us. We didn't deal

(Testimony of Beatrice Wilson.)

with Radford, except that it was listed, and we don't deny [80] that they found out about it through the Radford Company, but we never had any dealings with the Radford Company directly in connection with this particular transaction, nor did we have anything to do with what they paid Radford. We paid Radford no commission.

The Court: Counsel, if the statement of Mr. Cornish were made in the form of a stipulation that it was listed on the market and that Radford was one of the companies through which it was listed, if that were put in the form of a stipulation, would that satisfy you?

Mr. Cornish: That is, it was listed at one hundred ten a month?

Mr. Spohn: If you will stipulate that the property was listed with the Radford Real Estate Company for rental.

Mr. Cornish: It was listed with Radford and several others; there is no doubt about that, and listed at \$110.00 per month. Now, whether Radford took 60 per cent of the first month's rent or whether on the basis of half of what the first month's rent was, I don't know. I don't know how they computed that. In fact, I never heard of a commission being paid for renting it until just today.

The Court: The point is, Mr. Spohn, with the additional fact that it was listed at \$110.00 per month, are you still willing to accept that as a stipulation?

(Testimony of Beatrice Wilson.)

Mr. Spohn: Yes, we will take it. [81]

The Court: Yes, it will, then. It is so stipulated; and did you desire, then, to introduce this check into evidence at this time?

Mr. Spohn: Well, in view of that, I believe I will. I am not going to offer it or press the point at this juncture of the case.

The Court: Yes.

Mr. Spohn: I think, following your Honor's suggestion that if it should become more important as the trial develops, that we should then take it up. However, I want to make the point on this proposition that counsel has offered about the listing at \$110.00. I am not in a position—I don't know what——

The Court: You are not willing to stipulate that it is one hundred ten per month?

Mr. Spohn: No, we are not in a position to even know what the listing was.

The Court: I am not going to require you to stipulate to a fact that you do not know to be true, but for the purposes of the record, at least, we can agree here that it was listed on the market and that it was listed with the Radford agency, and then the amount which it was listed for will have to be an amount of proof. I can't require counsel to accept a stipulation as to the amount, even though that may be accurate, and I don't want you to stipulate to it without checking it. [82]

Mr. Cornish: I don't care whether he accepts all or part of the stipulation. I merely wanted to

(Testimony of Beatrice Wilson.)

let the Court know that there won't be any contention on our part that it wasn't listed. We don't deny it.

Mr. Spohn: Then, it is stipulated that the premises were registered with the Radford Company, among others, for a rental at this time.

The Court: Yes.

Mr. Spohn: All right.

Q. Now, returning to your testimony, Mrs. Wilson, do you recall the circumstances under which you were referred to the defendants McKittrick for the rental of this house?

A. Yes, because——

Q. I think you have previously stated that you came upon this listing in canvassing the market? Is that right?

A. That's right.

Q. And through the Radford Agency, you learned that the house at 111 Oakmont Avenue, Piedmont, was for rent?

A. That's right, uh-huh.

Q. Were you referred to the defendants McKittrick, or was the matter handled by the Radford Agency—or, after you found out that it was listed, how did you go about renting it?

A. We handled it ourselves.

Q. How were you put in touch with the defendants?

A. I asked—I can't recall the real estate lady's name, but [83] I asked her the name of the people who were living in it, because at that time it was

(Testimony of Beatrice Wilson.)

getting late in the afternoon and she didn't want to show me the house. It was after five. But because I wanted a house I then went home and phoned the people—their name was Evans—looked in the phone book and got the name, told them I heard the house was for rent and could I see it. They said yes, and I phoned Mr. Wilson from San Francisco and he flew home. We both went over about six o'clock to see the house.

It suited our needs very nicely. We said yes, we would take it. We were told we couldn't until we were interviewed by the owners who lived in Walnut Creek.

We happened to know our way around Walnut Creek, so we phoned the McKittricks and asked if we could come out and see them that night, and they said other people were coming but we could come tomorrow, yes, which we did. We were the first ones that were there because we knew how to find the house. We were the first ones to be interviewed by the McKittricks.

Q. You and your husband?

A. Yes, both of us. They would not say whether we could have the house or not until the next day, and I think it was the next day that they phoned me and said, "Yes, you may have it."

Q. Now, the first evening that you and your husband called upon the McKittricks at Walnut Creek, did you have any discussion about the [84] rent?

(Testimony of Beatrice Wilson.)

A. Oh, I am sure we must have.

Q. Do you recall exactly whether or not you did have any discussion?

A. Yes, we had a discussion about the rent.

Q. And do you recall the details of that discussion? In other words, how much the rent was said to be, and anything that was said as to the fashion, manner, in which you should pay it?

A. Not the fashion that we would pay it, but we went home realizing that if we——

Q. Before you went home, do you recall what, if anything, was specified as the rent for the house?

A. We realized that we would have to pay \$135.00 for that house if we——

Mr. Cornish: I ask that that answer go out as not responsive.

Mr. Spohn: If your Honor please, we will straighten it out.

The Court: Counsel is entitled to have the record clarified, and that answer will go out, and the form that it is in, but you will be permitted to question her further on it.

Q. (By Mr. Spohn): To rephrase it, Mrs. Wilson, did the McKittricks tell you what the rent was for the house? A. Yes.

Q. And what, if anything, did they say?

A. They told us that they had been getting \$110.00 a month [85] but that they were going to go and ask for \$135.00.

Q. Where were they going to go and ask?

(Testimony of Beatrice Wilson.)

A. It was an O.P.A. that controlled that, the rent control agency.

Q. And did they tell you that the rent would be \$135.00 or——

A. That they thought it would be, yes.

Q. And did you agree to pay that? Now, that was the first night that you were there?

A. Yes.

Q. Now, you say that you went again another night. First of all, did you sign any lease or enter into an agreement on that first night?

A. No.

Q. Did you pay any money the first night?

A. No.

Q. When did you get down to the details of actually paying money?

A. Well, it was a day or two later.

Q. A day or two later?

A. Yes, they phoned us and told us that we might have it, and we settled it as quickly as possible. I would say maybe the next night or maybe the night after that.

Q. Now, where did you settle it?

A. In their home.

Q. You went back to Walnut Creek? [86]

A. Yes.

Q. You and your husband went? A. Yes.

Q. And who were there besides the McKittricks and their daughter?

A. We met their daughter for a short time.

Q. Nobody else there? A. No, no.

(Testimony of Beatrice Wilson.)

Q. Do you recall the transaction that occurred then on the second evening when you went back?

A. I couldn't tell you just word for word,

Q. Now, what I am getting at directly, do you recall whether you discussed entering into a written lease for the premises? A. Oh, yes.

Q. Do you recall if a written lease was signed that evening? A. I think it was.

Q. Is that the lease which has been identified as defendants' Exhibit C? (Showing the witness a document.)

A. I haven't seen this one.

Q. On the back of which appears the signature of Barbara McKittrick, Bruce Wilson, and Beatrice Wilson? A. That is my signature, yes.

Q. Do you recall signing that lease?

A. Yes, I believe I do.

Q. Do you recall any of the details about the change that [87] appears to have been made here on the first page as to the amount of payment which is initialed by your husband? Do you recall any discussion about that?

A. No, but there was some discussion about this change in rent from what the Evans had been paying and what we were to pay.

Q. What was that discussion?

A. Well, the discussion was there, you see, the rent ceiling—there was a week there that was sort of a moratorium on rent ceilings at that time. It was removed for about a week, and it was at that time and they said that they were going to go and

(Testimony of Beatrice Wilson.)

ask that their rent ceiling be raised because they felt their place, being rented as a furnished house, was worth more than the \$110.00 that they were getting and that there were so few places on the market that they should have it, and we thought that it would all be taken care of and so we went along with it.

Q. Now, do you recall any discussion about how this money should be paid? Particularly, Mrs. Wilson, I have reference to the testimony given by your husband this morning to the effect, to the effect that \$300.00 was paid in a lump sum at the time you entered into the lease arrangement, that the \$110.00 was paid each month in addition to that three hundred.

Mr. Cornish: I will object to that on the ground that it is leading and suggestive. [88]

Mr. Spohn: If your Honor please, I am just asking the witness what recollection she has of the transaction, which goes to the very nub of the proceeding.

The Court: That, I understand, counsel, but relating to what her husband has testified to, is, in form, leading. I don't know how suggestive it is. You are trying to direct her to a certain subject.

Mr. Spohn: Factually.

The Court: Well, I will overrule the objection at this time, but I will, since the objection has been raised, caution you to let the witness answer the questions and have the questions not indicate the answer.

(Testimony of Beatrice Wilson.)

Q. (By Mr. Spohn): Mrs. Wilson, do you recall the details of payment of the rent?

A. Yes.

Q. You do? A. Yes.

Q. Now, will you state briefly what those details were?

Mr. Cornish: I will object to that, if the Court please, as calling for the opinion and conclusion of the witness.

The Court: Overruled.

Mr. Cornish: I have no objection to her testifying to the conversation, but I think to testify to what the details of payments were is calling for her conclusion.

The Court: It is still overruled. We want the sum and [89] substance of the conversation.

Q. (By Mr. Spohn): To the best of your recollection, will you tell the Court what transpired?

A. After some discussion about the rent, it was decided, because they wanted a *least*, they wanted to know that we would say there for a year at least; and, you know, they didn't want tenants moving in and out of their house often, and it was decided that we would pay the rent at \$110.00 a month and pay the \$300.00 in a lump sum until we got this adjustment made, and it was our understanding it was only a routine matter and they would get the adjustment made. The fact that we didn't further hear from them also led us to believe that we were to continue to pay as we had paid,

(Testimony of Beatrice Wilson.)

so that when the year was up, we paid \$135.00 because, in essence, we had been paying \$135.00.

Mr. Cornish: I will ask you Honor that that answer be stricken out on the ground that it is the opinion and conclusion of the witness.

Mr. Spohn: If your Honor please——

The Court: On that ground, I will overrule the objection.

Mr. Cornish: As to what they inferred and what they concluded.

I have no objection to what was said, but the conclusion that they drew, I object to.

The Court: And it goes beyond a direct answer to the [90] question, Mr. Spohn. That portion of the answer that deals with subsequent to the meeting there will go out, but that portion of the conversation that dealt with the time at which the meeting took place will stand.

Q. (By Mr. Spohn): Well, now, directing your attention, Mrs. Wilson, to the time of July, 1947, do you recall the renewal of the lease?

A. No, it seems to me——

Q. To refresh your recollection——

A. Yes, I know that little item that is written there. Mr. Wilson wrote it. The year was up and we had some little discussion about it at home.

Q. At home? Now——

A. At our home.

Q. You and Mr. Wilson?

A. Mr. Wilson and I. We did not go out to see the McKittricks.

(Testimony of Beatrice Wilson.)

Q. You did not? A. No, sir.

Q. What did you do?

A. As I recall it, we just signed. He wrote that little notation to the end of our lease and sent it to them and they sent it back to us.

Q. Do you recall any discussion that you had with them?

A. No, we didn't have any discussion. [91]

Q. You didn't have any discussion?

A. No, we didn't have any discussion about it.

Q. Now, subsequently, I believe that renewal ran according to the lease, ran for the year July 13, 1947, to July 13, 1948. Do you recall any discussions on or about July 13, 1948, about any further renewal of the lease?

A. All this time, we were waiting to have a home of our own; and by that time, we had hoped that we would find one and we had hoped that we would not have to sign another lease because, some time during that year, we hoped to find a place that we could have, so they didn't ask us to sign it, and we decided that we wouldn't volunteer to it as we had the first time.

Q. Did you have any discussion with the McKittricks when the renewal expired in July of 1948?

A. No.

Q. Was there any discussion thereafter with them? A. No.

Mr. Spohn: I have no further questions of Mrs. Wilson at this time.

(Testimony of Beatrice Wilson.)

Cross-Examination

By Mr. Cornish:

Q. Mrs. Wilson, all that you found out from the Radford Realty Company was that the house at 111 Oakmont was available for rent?

A. That's right.

Q. They never showed you the house? [92]

A. No.

Q. They didn't even tell you who owned it?

A. No, I don't think so.

Q. And you discovered the telephone number of the tenant, the name of the owner, by your own resources?

A. That's right.

Mr. Cornish: I have no further questions.

The Court: That is all.

(Witness excused.)

Mr. Spohn: If your Honor please, that constitutes the plaintiff's case in chief.

(Plaintiff rests.)

Mr. Cornish: We will call Mr. McKittrick.

The Court: All right.

DONALD McKITTRICK

one of the defendants, called in his own behalf, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cornish:

Q. Mr. McKittrick, you and your wife own this property at 111 Oakmont Avenue? A. Yes.

Q. And where do you live?

A. Walnut Creek.

Q. What is the address in Walnut Creek?

A. Post Office Box 39. The house is on San Miguel Road. [93]

Q. What kind of a house do you live in, in Walnut Creek?

A. It's a wooden frame building. As to the number of rooms available——

Mr. Spohn: If your Honor please, the issue doesn't concern the living quarters of the defendant in Walnut Creek. It only concerns whether they overcharged for the premises on Oakmont.

The Court: Is this preliminary to anything?

Mr. Cornish: Yes, your Honor, to our defense that there is no equity in the case that justifies restitution. This house that he is about to describe is the property which we are prepared to show that at the time the Wilsons applied for this property, they had an opportunity to lease for \$180.00 per month.

The Court: I think I understand, and they have raised the issue in their pleadings, counsel—in their

(Testimony of Donald McKittrick.)

answer, saying—or in the interrogatories, as I recollect it, in the answers to the interrogatories—taking the position that there was an agreement for some sort of a premium for giving up the opportunity to rent their home in Walnut Creek to some other person.

Mr. Cornish: That's right.

Mr. Spohn: If your Honor please, on the law and on the regulations, that is beyond the issues. Under the regulations, any bonus, gratuity, or other payment which is made for or in consideration with the rental of any controlled housing [94] accommodations constitutes an overcharge.

Mr. Cornish: And it is recoverable within a year, but not after. You are coming into equity.

Mr. Spohn: Under Section 205 which relates to the action brought by the defendant in his own right, but not under Section 206 which relates to the injunction and other reliefs sought by the government in this proceeding.

Mr. Cornish: May I call your Honor's attention to the fact that, during a substantial portion of this period, the government had no cause of action. Now, there was only the tenant that could bring the suit.

The Court: We are going to get into that in argument, and the thing I am interested in now is the point of your objection, which I understand is that it is incompetent, irrelevant and immaterial.

Mr. Spohn: That is quite right, yes, your Honor, under the law and under the regulations.

(Testimony of Donald McKittrick.)

The Court: Under the law and the regulations; however, I am not at this time prepared to make a ruling on this point and I don't want to hear the argument now, and make an arbitrary ruling, cutting counsel off. I am going to allow him to proceed. I am going to overrule the objection, but permit you to make your motion to strike and reserve my ruling on the motion to strike, and then we will hear the argument, either orally, or in writing. [95]

Mr. Spohn: Well, I will make the motion formally, then.

The Court: Yes.

Mr. Spohn: To strike this entire line of testimony on the ground—

The Court: First, I think you should object.

Mr. Spohn: I object to this on the ground that it is incompetent, irrelevant and immaterial to the issues here at hand, and I base that objection on the provisions of the statute, the Emergency Price Control Act of 1942 as amended, particularly Section 4a thereof and the Regulations adopted pursuant thereto, which are to be found in the Rent Regulations for Housing under that Act, published at 9 Federal Register, 5807, Section 2 and Section 13, appearing on May 30, 1944; and also under the comparable statutory provision, Section 2068 of the Housing and Rent Act of 1947 as amended, and the Regulations issued pursuant thereto and published in 12 Federal Register at 4331 on July 3,

(Testimony of Donald McKittrick.)

1947, particularly Sections 1 and 2 of the later regulation.

The Court: Well, now, I will overrule that objection now, but the testimony—it will be understood that the testimony that will follow along this line will be subject to your motion to strike upon the same grounds, and the Court is now stating at this time that it is going to reserve its ruling upon that motion.

Mr. Spohn: In effect, you are holding it in abeyance? [96]

The Court: That's right. I am going to hear the testimony subject to that motion to strike.

Proceed.

Q. (By Mr. Cornish): Just describe this home, if you will, please, this home in Walnut Creek.

A. Four buildings, one a garage with living quarters, and a bathroom, and the housing accommodations for a man, a garage for two cars, and a bathroom, a storeroom of about 30 by 20, concrete floor. Another building with 2 rooms, bedroom below, a library above. The other building contains—well, the total makes 9, and 2 bathrooms.

Q. Nine rooms and 2 bathrooms?

A. There are three bathrooms altogether and 9 rooms altogether.

Q. And what area of land is involved with that house? A. Between six and seven acres.

Q. Now, do you recall when you first met the Wilsons? A. Yes.

Q. At or about that time, had you had any in-

(Testimony of Donald McKittrick.)

quiry made as to the availability of your Walnut Creek home for rent? A. Yes.

Q. Were those inquiries made before or after you met the Wilsons?

A. They were made before we met the Wilsons. They were made after the house—we knew the house was going to become vacant. [97]

Q. After you knew the Oakmont house would become vacant? A. Yes.

Q. And do you recall the name of any person or persons who made inquiry about the house?

A. Yes, there was a man whose name was Mr. Grierson or Grayson—some such name—who had done—or had come out in connection with some work on the house about a year before, I think, and he came out to see us and wanted to know if we wouldn't let him have the house.

Q. What did he offer you?

A. One hundred eighty per month.

Q. Was that house subject to Area Rent Control regulations? A. No.

Q. Now, how long was that inquiry prior to the time you met the Wilsons?

A. Oh, a few days.

Q. A matter of a few days? A. Yes.

Q. Had you and your wife discussed it—this proposition? A. Yes.

Q. And had you and your wife come to any conclusion as to whether or not you would accept the proposition before you met the Wilsons?

A. No, but we were considering it because there

(Testimony of Donald McKittrick.)

was—you see, there was \$79.00 a month difference in rental between [98] that and what you could get for the one in Oakland.

Q. Now, where were you working at the time?

A. What was that date?

Q. In 1946, the summer of 1946.

A. I think I was still at the University then.

Q. The University of California? A. Yes.

Q. And was this house in Oakmont closer or farther away from the University of California?

A. Oh, much closer.

Q. In other words, there would have been—you could have saved transportation, as well as you might save rental overhead by moving into Piedmont? A. Oh, yes.

Q. Now, when did you first meet——

Mr. Cornish: That, your Honor, is the extent of the testimony that I propose to offer covering which counsel has made his motion to strike.

I will stipulate that the motion has been renewed to—the objection made and you have reserved the ruling.

Mr. Spohn: I remove the motion to strike on the grounds that I have given——

The Court: Yes, he has stipulated to that fact, and that will be the state of the record.

Q. (By Mr. Cornish): Now, Mr. McKittrick, where did you first [99] meet the Wilsons?

A. When they walked in at the door the evening to inquire about the house.

(Testimony of Donald McKittrick.)

Q. Had you talked to them on the telephone before, yourself?

A. My wife, I believe, had.

Q. And the first you heard from them was when they first came to the door?

A. That's right.

Q. They came together?

A. Yes.

Q. And you and the Wilsons had a conversation at that time at your home?

A. That's right.

Q. Who was present?

A. Myself and my wife, Mr. and Mrs. Wilson.

Q. Will you tell us, Mr. McKittrick, as best you can now recall what was said by each of you in that conversation?

A. I can give you the substance of the conversation, that is to say, the tenor of it. We pointed out to them that we had this rent offer of \$180.00, or we had a recent offer. I don't know if I specified the sum. We didn't feel that we should rent it at one hundred ten. We didn't feel we should rent it until we had thought about it, but Mr. Wilson said that he thought the place was worth more than one hundred ten. The conversation fixing that figure of one hundred thirty-five, I [100] do not remember, but we did not settle with him that night; and his last remark on leaving the house was—he said, with a sort of a friendly boyish air, you know, “Please, Mr. McKittrick, rent us your house.” So that is as far as it went that night.

Q. Now, up to that time, had your wife, to your knowledge, made inquiry with the Area Rent Con-

(Testimony of Donald McKittrick.)

trol Office as to the possibility of increasing your rent ceiling on the property at Oakmont?

A. Not at that time, no.

Q. All right. Up to the time that you finally—you and Mr. Wilson and your wife signed the lease, had you or your wife made inquiry from the Area Rent Control as to the possibilities of increasing the rent?

A. No.

Q. Were there any negotiations pending, to your knowledge, at the time that you leased the property to the Wilsons, pertaining to an increase in rent?

A. No.

Q. All right. Now, what was your next contact with the Wilsons following the first night when they came to the house?

A. They came, as Mr. Wilson said, one or two days later; and at that time the agreement was settled.

Q. All right; did they come at their invitation, or at yours?

A. We told them they could have the [101] house.

Q. You told them that how, by telephone?

A. Yes, because there were the only two times—that is, I presume it was by telephone; there was no other method that I can think of.

Q. In other words, between the first meeting at your home and the second meeting at your home, either you or your wife telephoned the Wilsons and told them could have the house?

(Testimony of Donald McKittrick.)

A. That's right. I think that is what was said. I have no recollection myself of how it came.

Q. All right.

A. They may have come voluntarily the next time; I don't remember.

Q. Now, I call your attention now, Mr. McKittrick, to defendants' Exhibit C for identification, and ask you in whose handwriting that is?

A. That is my handwriting.

Q. That is? A. This dark stuff.

Q. That is, except the printed portion, your handwriting?

A. You mean the longhand? This is all in mine, yes.

Q. Now, calling your attention to the date, the 13th of July—— A. Yes.

Q. (Continuing): ——1946, is that your handwriting? A. That's right; that is mine.

Q. Now, I call your attention to the figure on the third line, [102] the 13. A. Yes.

Q. And the fact that that has been altered. Can you tell me about that alteration?

A. This, I take it, looks as though—it came about this way, I think. Mr. Wilson asked if he could send his check on the 15th rather than the 13th because he wrote his checks for all his monthly payments on that day and it would be very convenient. I said yes, of course, he could; and I imagine I started to change the lease from the 13th to the 15th, and then decided to let it go to the 13th and simply say in the body, as we do here, that the rent would be due on the 15th.

(Testimony of Donald McKittrick.)

Q. All right. Now, I call your attention to the change on the third from the bottom line on page 1 where the word, "sixteen" is crossed out and the word, "thirteen" interlined. A. Yes.

Q. Simply to the figure "16, 20" crossed out, and the figures "13, 20" interlined. A. Yes.

Q. That was done by you, was it? Was it done in Mr. Wilson's presence? A. Yes.

Q. Now, did you and Mr. Wilson discuss the change of those figures before you changed them?

A. I don't remember the discussion but they were changed in [103] his presence.

Q. Those are his initials alongside of those changes?

A. That's right. I pointed out to him the necessity of initialling the changes with both our initials wherever they occurred.

Q. Now, was that made out in his presence, or had you made the lease out by the time he arrived?

A. No, we wrote—I couldn't say as to that, but I know I made a copy in his presence, the clean copy that he had.

Q. I am showing you now plaintiff's Exhibit 3 and I will ask you if you copied that in Mr. Wilson's presence?

A. Yes, I did. I remember clearly that I was in a hurry to get that over with, not to delay him.

Q. And after that was copied, did Mr. Wilson leave the house with that copy? A. Yes.

Q. It wasn't mailed to him two or three days later? A. No.

(Testimony of Donald McKittrick.)

Q. Then, at that time that the second copy was made, the changes had been made and initialled in the first copy, is that right?

A. At the time the second—yes, the second copy was made from the first copy.

Q. Now, you received Mr. Wilson's check for \$300.00, did you not? [104]

A. From his hand?

Q. Yes, and that was handed to you at the same time the lease was signed?

A. That's right.

Q. I call your attention to the discrepancy in the dates of the check dated the 11th of July, and the lease being dated the 13th, and ask you if you can explain that discrepancy?

A. No, I didn't look at the dates.

Q. Was the lease dated the day that it was signed?

A. Yes; that's how the discussion about 13 and 15 arose.

Q. Then, the check, the dates on the check, then, would be an erroneous date, and not the date on the lease?

A. Well, it is not the date on the lease.

Q. At the time you were talking about this lease, did you and your wife and Mr. Wilson and Mrs. Wilson discuss the Area Rent Control ceiling price on the rent?

A. Yes, we told them it was one hundred ten, and that at that price, we didn't feel justified in—

(Testimony of Donald McKittrick.)

well, that was the day before—we had already told them that the day before.

Q. And Mr. Wilson told you that, in his opinion, it was worth \$135.00? A. That's right.

Q. Now, were there any conversations that you can recall now between yourself and Mr. Wilson concerning him paying you \$300.00 in [105] advance?

A. He offered to make the payment. I am trying to think why I had that one hundred thirty-five on the lease and then crossed it out. I don't remember that.

Q. Did you ask Mr. Wilson to give you the check for \$300.00, or did he offer to give it to you?

A. The offer came from him to make the extra payment.

Q. And up to the time that he offered, you hadn't asked him to pay more than \$135.00 per month as was written in the lease?

A. More than one hundred thirty-five?

Q. At one time—let me reframe the question.

A. I didn't ask him.

Q. You hadn't asked him for a check for more than \$135.00 up to the time that he made it, or to give you a check for the three hundred?

A. We hadn't asked him for a check for more than one hundred ten before he made it over.

Q. For more than one hundred ten. Now, during the rest of the year of the lease, Mr. Wilson sent you checks regularly for \$110.00?

A. Yes.

(Testimony of Donald McKittrick.)

Q. Now, I am calling your attention to the extension agreement on the part of the plaintiff's Exhibit 3, and I will ask you when you signed that extension agreement?

A. On his copy, or mine?

Q. On his copy. [106]

A. That I don't remember; but it was—well, I remember that it was at least two or three months after the date July 13.

Q. Of 1947? A. That's right.

Q. And where was it signed?

A. On his copy?

Q. On his copy.

A. I don't doubt his statement is correct that he made to me, because I can tell you what occurred on that evening at his house, if you wish.

Q. Now, I call your attention to defendants' Exhibit C for identification, and the extension on that, and ask you when you signed the extension agreement on defendants' Exhibit C for identification?

A. That was also at a time two or three months after July 13.

Q. All right, were the extension agreements on those two copies signed at the same time?

A. I don't call to mind the signing of more than one of them at the same time. That is this one which is written in my handwriting.

Q. Now, where was the one that was written in your handwriting on defendants' C for identification signed?

(Testimony of Donald McKittrick.)

A. In Mr. Wilson's home. That is to say, 111 Oakmont.

Q. And both Mr. and Mrs. Wilson affixed their signatures at the same time? [107]

A. That's right.

Q. Was your wife present at the same time?

A. Yes, and——

Q. And she signed at the home? A. Yes.

Mr. Cornish: We ask that C for identification be admitted into evidence.

The Court: It will be admitted into evidence as Defendants' Exhibit C.

(Thereupon Defendants' Exhibit C, defendants' copy of lease, was admitted into evidence and marked Defendants' Exhibit C.)

DEFENDANTS' EXHIBIT C

[A lease of premises similar to Exhibit A attached to Answers to Interrogatories filed Oct. 28, 1950. See pages 27 to 30 of this printed record. The following renewal is an addition to the original lease in Defendants' Exhibit C.]

This lease is hereby renewed for the present from July 13, 1947, to July, 1948, on the same terms as above.

/s/ D. S. McKITTRICK,

/s/ BARBARA McKITTRICK,

/s/ BRUCE A. WILSON,

/s/ BEATRICE S. WILSON.

(Testimony of Donald McKittrick.)

Q. (By Mr. Cornish): Now, at the time you signed the extension on either one of these leases, previous to signing the extension, had you received any check from Mr. Wilson other than the \$300.00 check, for more than \$110.00?

A. Yes, we had received two or three monthly checks for one hundred thirty-five.

Q. Had you ever asked Mr. Wilson to make out a check for one hundred thirty-five dollars?

A. No.

Q. He had sent those of his own volition?

A. That is right.

Q. And two or three of those checks had been sent before the extension agreement on either copy was endorsed? [108]

A. That's right.

Q. Now, at the time you went to Mr. Wilson's home, or to 111 Oakmont, and you and your wife talked to Mr. and Mrs. Wilson concerning the extension——

A. Yes.

Q. (Continuing): ——will you relate the conversation that you had at the time that you signed the extension agreement at Mr. Wilson's home?

A. We went there in the evening—yes, it was by appointment over the telephone, and after a little general conversation, 15 or 20 minutes or a half an hour, Mrs. Wilson said, "Would you have a drink?" And we said, "Yes," and she brought whiskey and soda and we had them. And I said to Mr. Wilson, "What about the lease? It ought to be signed again; it's two or three months." He said, "Well, since the old one expires," he says,

(Testimony of Donald McKittrick.)

“Well, I am satisfied with the way things are going now, if you are; let’s have it.” And I passed it to him and he signed it. Then, the other signatures were affixed. There was a little more conversation and we went home.

Q. Did you ask Mr. Wilson to pay another \$300.00 at that time? A. No.

Q. Now, then, each monthly check that Mr. Wilson sent you from that time on was \$135.00?

A. Yes. [109]

Q. Did you at any time after Mr. Wilson moved into the house, ever ask him to send you a check for \$135.00? A. Never.

Q. You did, however, receive such checks?

A. Yes.

Q. Now, what condition did you find the premises when Mr. Wilson left?

Q. Quite a lot of work done on it, both in the garden, the shrubbery trimmed back, and the furniture in the attic was badly moth-eaten and the rugs were moth-eaten. Several items—two items that were mentioned by you were missing from the inventory.

Q. You mentioned two items missing. Can you describe those two items?

A. Yes, a water color landscape and a drypoint etching by a man who is a well known painter.

Q. And what was the value of the water color landscape?

A. I am not an expert, but compared with

(Testimony of Donald McKittrick.)

others, it was quite an attractive picture. I would say around a couple hundred dollars.

Mr. Spohn: We will object to that as calling for the conclusion of the witness. He testified that he don't know what it is worth.

The Court: He said he is not an expert.

Mr. Cornish: The owner can always testify as to the value [110] of his own property. The objection goes to the weight of the evidence.

The Court: That is true. The objection is overruled.

Q. (By Mr. Cornish): Was the picture framed when Mr. Wilson moved in?

A. Yes, hanging in the living room.

Q. And did you find the frame after he moved out?

A. Yes, we saw it quite recently up in the attic.

Q. In other words, the frame is still there, but the picture is gone?

A. That's right.

Q. Now, the etching: What in your opinion was the value of the etching?

A. It was a signed etching by a painter, Piazzoni, and I would estimate it at \$200.00—a dry-point.

Q. Now, was there any damage to the furniture that was still in the lower part of the house—not in the attic?

A. I think you had better ask my wife those questions because she went over the furniture carefully. I only looked at it more or less casually.

(Testimony of Donald McKittrick.)

Q. Do you know whether any money was paid out for repairs on any such furniture?

A. By ourselves?

Q. Yes.

A. Yes, we had a lot of work done. We had a man there for a [111] couple of weeks cleaning and polishing and pruning and so on.

Q. Now, what was the condition of the things in the attic?

A. They were badly moth-eaten. The davenport, its cushions, and I have in mind at least one upholstered chair.

Q. Now, were the upholstered chair and the davenport and the cushions in the attic at the time that Mr. Wilson moved in?

A. That's right. He asked permission to leave them there because the Evans had had them up there, and we granted him that permission.

Q. And were those items included on the inventory? A. They were.

Q. Was the furniture in the house turned over to you completely cleaned? Were the windows cleaned, blinds cleaned, floors cleaned, waxed and polished, and all trash removed and the entire property ready for occupancy when the Wilsons moved out?

A. No. As I said, we had to spend a couple of weeks' work on it.

Q. Was the garden turned over in good condition? A. No.

Q. Did Mr. Wilson do the cultivating, fertiliz-

(Testimony of Donald McKittrick.)

ing and irrigating necessary to maintain the garden during the time he was there?

A. As to that, of course I am not in a position to say. I know what the garden was like when he went there and what it [112] was like when he left.

Q. What was the difference?

A. He had kept the garden in very nice shape. He had a man there pruning and cutting grass and all. The shrubbery had grown up quite a lot during the time the Wilsons were there, the three years.

Q. Had he kept them pruned?

A. Not sufficiently, no, because we had to have them pruned. It took several days, as I say, to get them in shape after they had left.

Mr. Cornish: You may cross-examine.

The Court: Now, counsel, before you proceed to cross examine, we will take a short recess at this time.

(A short recess was taken.)

After Recess

The Court: Proceed with your cross-examination, Mr. Spohn.

Cross-Examination

By Mr. Spohn:

Q. Mr. McKittrick, I believe you testified that the premises in Oakmont Street were listed with several real estate agents for rental in July of 1946.

A. They were.

(Testimony of Donald McKittrick.)

Q. Do you recall the amount of rent specified in those listings? A. One hundred ten.

Q. One hundred ten. You have previously testified about the [113] negotiations that you and your wife had with Mr. and Mrs. Wilson for the rental of the premises, in July of 1946.

A. What were you asking?

Q. I say—— A. You heard what I said?

Q. All right. You recall what you said?

A. Here, a moment ago, yes.

Q. Now, who specified the amount of rent of \$135.00 for the premises?

A. Mr. Wilson. By that question, I presume that you mean the offer to rent, to pay more than one hundred ten came from Mr. Wilson, is that what you mean?

Q. My question was—and I repeat—who first specified the amount of \$135.00 as the rent for the premises? A. Mr. Wilson.

Q. Are you quite certain of that?

A. I am certain that I did not set any figure over one hundred ten, because I am certain that I said we couldn't afford to rent it at that, we would have to move out—back, rather.

Q. Now, do you recall the conversation that took place among the four of you on that occasion?

A. Parts of it.

Q. Well, do you recall whether or not the Wilsons asked what the rent was?

A. The rent was discussed, since they knew what the rent was. [114]

(Testimony of Donald McKittrick.)

Q. Now, I am asking you——

A. They did not—do I recall them specifically saying to me, “What is the rent for the house?”

Q. Yes. A. No.

Q. Do you recall your saying what the rent of the house was? A. Yes.

Q. You told them how much?

A. One hundred ten.

Q. Did you tell them that was the so-called O.P.A. ceiling amount?

A. That’s right. That was the point of the discussion, of course.

Q. And what did you say about that one hundred ten rent?

A. That we thought we would move back into Oakmont Avenue because we could get more for our place out there.

Q. By “the place out there,” I assume——

A. Walnut Creek, yes.

Q. Now, what was the next statement made after you said that?

A. I, of course, cannot recall the conversation of four years in a sequence of statement, but I can give you the tenor of the conversation, if that is satisfactory.

Q. I am asking you to the best of your recollection what was the next statement?

A. I have no idea what the next statement that was made after [115] the preceding one was.

Q. Have you any idea, Mr. McKittrick, of who

(Testimony of Donald McKittrick.)

first proposed paying \$135.00 a month rent for the premises?

Mr. Cornish: I object to that as having been asked and answered.

The Court: I will overrule the objection. You can answer it if you can.

The Witness: I say it was Mr. Wilson.

Q. (By Mr. Spohn): Do you recall any detail as to how that amount should be paid?

A. I cannot recall the details that involved my writing that lease at one hundred thirty-five, rubbing out the figures and making them one hundred ten, and Mr. Wilson paying that \$300.00 in one lump sum.

Q. You have no recollection whatsoever of that?

A. Of the details of that, no. I have a recollection only that the figures were crossed out, and I pointed out to Mr. Wilson that, because of the change, we should both initial them.

Q. Do you recall how the \$300.00 happened to be paid in one lump sum?

A. Rather the increments.

Q. Rather than monthly, how did it happen to be paid in one lump sum in advance?

A. Yes, we couldn't very well move back after Mr. Wilson was in, and Mr. Wilson might easily have said he didn't wish to [116] continue paying the bonus for not moving back in, so it was safer to get it first.

Q. Well, did you specify that it should be paid in advance?

(Testimony of Donald McKittrick.)

A. I told him if he wanted to pay that bonus, he had better give it to us.

Q. At that time? A. At that time.

Q. At that time in advance?

A. At that time.

Q. Now, you thereupon entered into lease agreement that is in evidence? A. That's right.

Q. Now, you have testified as to the renewal of the lease—— A. That's right.

Q. (Continuing): ——sometime a year later. Do you recall any conversations as to the way in which the rents should be paid for the second and following years?

A. Yes, as I said, I said to Mr. Wilson, "What about this lease?"—taking it out of my pocket, and he said, "If you are satisfied with the way things are going, everything is perfectly satisfactory with me."

Q. All right. And then you apparently—what did you say to that?

A. He reached out for the lease and took it across and signed it at a table across the [117] room.

Q. Who wrote the extension provision in it?

A. That's in my handwriting in one copy; not in mine on the other.

Q. And to the best of your recollection, when did that occur?

A. Two or three months after the date July 13.

Q. Now, I believe you testified, did you not, Mr.

(Testimony of Donald McKittrick.)

McKittrick, that at that time you were receiving monthly checks in the amount of \$135.00?

A. That's right.

Q. From the Wilsons. Did you have any conversation with them as to departure from the previous arrangement?

A. Except what I told you, I had no conversation with them at any time about the rent.

Q. You did receive and cashed the \$135.00 checks as they came in? A. That's right.

Q. And you continued throughout the period of their occupation to do that?

A. I cashed every rent check they sent me.

The Court: That has been stipulated to, counsel.

Mr. Spohn: Yes.

Q. Now, directing your attention to the—I might ask one further question—have you made any refund of any amounts to the Wilsons?

A. None. [118]

Q. Have you been served with papers as a defendant in any personal suit brought by them to recover any amounts in this transaction?

A. Not that I know of. Somebody came out with papers at some time and I referred them to my attorney, but I imagine it was the government's action.

Q. Addressing your attention to the matter of the furniture in the premises, what furniture was in the living quarters of the house at the time the Wilsons moved in, in July of 1946?

(Testimony of Donald McKittrick.)

A. Downstairs?

Q. By "the living quarters," I mean in the rooms which were used for living purposes, distinguished from the basement and the attic.

A. You include bedrooms?

Q. Yes, those rooms which were used for living purposes.

A. The normal furniture in a house, tables, chairs, beds, rugs, pictures. Well, now, as to that, I mean, you exclude those that were taken upstairs?

Q. I am asking you.

A. Ask it again, will you please?

Q. What furniture was in the living quarters of the house at the time the Wilsons occupied it?

A. I can only answer your question indirectly, because I have no mental picture of the house at that time. I can tell you the circumstances. Captain Evans had asked our permission to [119] move certain—after he had been there a certain length of time, he had got some furniture out from the East, because he expected to be stationed here for a long time.

Q. Without going into that detail, did you inspect the furniture prior to the time the Wilsons rented it? A. Yes.

Q. After the Evans moved out?

A. No, while they were still there.

Q. Towards the end of their tenancy?

A. Towards the end of their tenancy.

Q. Do you recall how much of your furniture was then in the living quarters of the house?

(Testimony of Donald McKittrick.)

A. I would say—this is again a deduction of the mental picture of the house—that about half the furniture was theirs, and about half was ours.

Q. Between the time after the Evans, the prior tenants, moved out and the Wilsons moved in, how much time elapsed?

A. It must have been very short—I can't remember. I know we lost no rental, I think, in the transfer. It was a very short time.

Q. And you have just stated that you did not go into the premises during that interim?

A. Yes, we went in there. Yes, I remember now. I remember the condition of several articles.

Q. Now, just what articles were in the living quarters of [120] the house at that time?

A. Again, I cannot amplify the preceding answer.

Q. And what was the preceding answer?

The Court: He said about half——

Q. (By Mr. Spohn): About half?

The Court (Continuing): ——was theirs and half was the tenants'. Is that correct?

The Witness: Yes.

Q. (By Mr. Spohn): As a matter of fact, Mr. McKittrick, hadn't everything been put either in the basement or the attic with the exception of the rug in the front room? A. No.

Q. And let me finish my question—the rug and the davenport in the front room, a wicker table somewhere else—perhaps in the breakfast room—and the stove and refrigerator?

(Testimony of Donald McKittrick.)

A. No, the davenport was one of the things that was removed.

Q. By whom?

A. By the Evans, and that is one of the things that Mr. and Mrs. Wilson asked permission not to bring down from the attic in order—because they said that they had their own davenport and would not like to have the trouble of carrying it up and down again.

Q. Where was the davenport?

A. In the attic.

Q. You are quite sure about that? [121]

A. That, I am sure of.

Q. Would it surprise you to learn that it was in the basement?

A. I mean, it was out of the living room, to the best of my knowledge.

Q. Now, you have testified that at the time the Wilsons vacated the premises in November of 1949, you found that considerable damage had been done to the furniture. Now, what furniture in particular had been damaged?

A. As I said to Mr. Cornish, I remember those things that my wife pointed out to me. I didn't look at it in as much detail as she did. There was a davenport that was moth-eaten.

Q. Where was the davenport when you saw it after the Wilsons moved out?

A. When she called my attention to it, it was downstairs.

Q. Downstairs where?

(Testimony of Donald McKittrick.)

A. In the living room.

Q. In the living room. What damage had occurred to it? A. Moths.

Q. Moths. To what extent?

A. Well, there were large patches on it where the mohair was eaten down.

Q. Just where on the davenport were these large patches eaten off?

A. Towards the bottom. I don't think there was any on the top, that is, the back, the front. Those points are not, as I [122] say, clear in my mind. I didn't concern myself with those details of the house.

Q. Now, what other items of furniture were damaged when you first returned? A. A rug.

Q. Which rug?

A. Which rug? Wait a minute, let me think. There was a rug in the dining room that had moths in it.

Q. Now, was that on the floor of the dining room when you came back in 1949?

A. When we came back after Mr. Wilson had left?

Q. Yes.

A. I couldn't tell you where it was when Mr. Wilson left. I can tell you this, that I saw it on the floor with the moths in it and the moths were not in it when Mr. Evans left the premises, or at least a very short time before he left the premises because I saw it.

Q. But you don't know where the rug was?

(Testimony of Donald McKittrick.)

A. No.

Q. In November of '49, after the Wilsons moved out?

A. In the interval before, between the time the Wilsons left and I saw it on the floor, you mean?

Q. Yes.

A. In other words, was it in the attic when he left, or on the floor? [123]

Q. Yes. A. That, I could not tell you.

Q. Where was it when you saw it?

A. On the floor.

Q. How long after they moved out was that?

A. Between the time they moved out and the time the next tenant went in.

Q. How long was that?

A. A few days, between the time I saw it and they moved out. The next tenant did not, however, go in immediately.

Q. What other items of furniture were damaged?

A. As I told you, I have not a complete list in my mind. My wife reported to me a number of articles and things that I——

Q. Is it fair to say, in the light of your testimony here, that the only two items that you know of that were damaged were the sofa and rug in the dining room?

A. Three items. The overstuffed easy chair, and the davenport, and some cushions.

Q. Where was the overstuffed chair?

A. Where was it when?

(Testimony of Donald McKittrick.)

Q. When the Wilsons moved in.

A. That was also in the attic. I say "in the attic"—it was out of the living quarters, stored, up or down.

Q. Where was it when?

A. When I saw it. [124]

Q. When the Wilsons moved out and you saw it?

A. When I saw it, it was downstairs again.

Q. It had been taken out of the attic and put downstairs?

A. Presumably.

Q. Do you know who took it out of the attic?

A. No.

Q. To what extent were these items damaged?

A. As I said, they were moth-eaten to such an extent that if you tried to sell them, they would have no value.

Q. Did you have them repaired?

A. You will have to ask my wife about those details of furniture.

Q. Did you have them——

A. Did I personally? Did I supervise, did I give an order for repair?

Q. Did you send them to be repaired?

A. I did nothing about it.

Q. Do you know where they were repaired?

A. My wife can tell you that.

Q. Is it your testimony that to your best knowledge you don't know whether they were repaired or not? Do you remember paying any bills for them?

A. It is my testimony that I do not know what

(Testimony of Donald McKittrick.)

specific articles in the furniture were repaired, or what was done to any given article. I can tell you only this: That work was done on the [125] furniture.

Q. Do you know by whom the work was done?

A. Yes, we hired a man to go out there and work on it. We had a man working there.

Q. What was his name?

A. His name was John Placido, I think.

Q. Where does he live?

A. I don't know where he is now. He was working for us at the time we had him out there for more than two weeks, doing repairs.

Q. What sort of work was he doing?

A. What does he do?

Q. Is he a furniture man or a house man or a gardener or just what?

A. He is a man capable of—he was a man capable of doing such a job as build a house. Yes, he is a carpenter.

Q. What sort of work did he do for you?

A. Oh, me?

Q. Yes.

A. Whatever I wanted him to do. I looked after the premises in Walnut Creek.

Q. Was he a general houseman?

A. What do you mean by general houseman?

Q. I wonder just how you would describe him. Was he an artisan?

A. Let's call him a handyman, if you like. [126]

(Testimony of Donald McKittrick.)

Q. All right, a handyman. And you had him repair these things?

A. He spent about two weeks working there.

Q. Repairing the furniture?

A. Yes, and other things, pruning the garden.

Q. How much did you pay him for that?

A. And putting the house in shape. That came to about two hundred, I think, for that.

Q. How did you pay him?

A. I beg your pardon?

Q. How did you pay him, by check?

A. Cash.

Q. Have you got any receipts for the money?

A. No.

Q. Do you have any record—income tax records that show that you paid that amount?

A. I have an income tax record. I don't remember what it shows. It shows the expenditures.

Q. Did you make any record at the time of what you paid this workman for the repair work that he did on the premises?

A. Let's see. We paid him for what he did. I can't tell you. At least two weeks he was there.

Q. In answer to my question that—

A. I beg your pardon?

Q. Do you have any record of what you paid him?

A. You mean, a separate record while he was working for me? [127] I can only estimate what I paid him, what his board and lodging was worth and the number of hours he put in that—

(Testimony of Donald McKittrick.)

Q. Do you have any record to show what you paid him during the period, say, of November, 1949?

A. Yes, he received——

Q. Where is that record?

A. At home. Wait a minute, that would be in the form of cancelled checks, plus his board and lodging.

Q. I thought you paid him in cash.

A. That is cash.

Q. Cash or checks?

A. Cash or checks. He got about—what did I say he got? About two hundred, didn't I?

Q. You, sir, should be in a position to recall that better than I. What was it?

A. Yes, he got about a value, I think—he got his board and lodging and he got his pay, his regular pay, and he worked hard there. He worked overtime and that. I paid him about \$50.00 extra in cash, plus his pay, which was \$50.00 a month, and his board.

Q. So that——

A. And my wife worked there during the same time.

Q. So that actually he received about \$100.00 for that month, is that right?

A. Plus his board and lodging, yes, for that period, let us [128] say, I don't remember whether it was—about two weeks, I think.

Q. During that time he was working for you at Walnut Creek?

(Testimony of Donald McKittrick.)

A. Employed by me, not working at Walnut Creek.

Q. Do you have any record anywhere that would substantiate your statements?

A. As to the period of time?

Q. And the amount of money that you paid him.

A. I have my cancelled checks for the cash he regularly received. I have no record of the extra money. I have no record, of course, of the cost of his board and lodging. I have no exact record of the time, the number of days of his time. I can, I think, however, give you that by looking at my income tax record.

Q. Did you take any deduction for the maintenance work that you had done on this rental property?

A. Of course.

Q. Do you recall what that was?

A. No, but I have it on my income tax.

Q. Where are those records?

A. At home.

Q. Now, directing your attention to the drypoint etching that you said was missing when the Wilsons left——

A. Uh-huh.

Q. (Continuing): ——how large an etching was that?

A. (Indicating.) I should say about eight by ten, a small [129] etching.

Q. And what was the subject matter of the etching?

A. Landscape.

Q. A landscape. Was it a mountain or a meadow or a brook, or what do you recall?

(Testimony of Donald McKittrick.)

A. Undulating landscape, with bushes on it.

Q. And by whom was the etching?

A. Piazzoni.

Q. Will you spell it?

A. (Spelling): P-i-a-z—possibly two z's—o-n-i.

Q. Where did you get that etching, Mr. McKittrick?

A. That was my wife's before we were married. I believe she had had it a long time.

Q. Where was it in the house?

A. Hanging on the wall in the living room, to the best of my knowledge.

Q. What wall in the living room?

A. That is too much for me to remember, because, you see—I can tell you where it was originally and where I saw it for a number of years. It was moved around.

Q. Where was it the last time you saw it?

A. That, I couldn't say. It used to hang over the mantle. No, it used to hang on the end wall. The watercolor was over the mantle.

Q. The etching was on the end wall, and the watercolor—— [130]

A. I said that is where I originally remember seeing them; where they were when the Wilsons were in there or the Evans—because each tenant moved the pictures around as they pleased.

Q. When was the last time you saw it?

A. When was the last time I saw it?

Q. When the Evans were there, where was it then?

(Testimony of Donald McKittrick.)

A. I cannot tell you. Let's see, now. Wait a minute—no, the last time I saw it was when the Wilsons checked—went—no——

Q. You don't recall?

A. Excuse me, I am going to recall it. Yes, the last time I saw it was when the Evans were there.

Q. When the Evans were there. You don't recall having seen it in that period between the Evans' occupation and the Wilsons' occupation?

A. No.

Q. So that you couldn't say whether or not when the Wilsons moved in——

A. No, I didn't check the inventory.

Q. Now, about the watercolor. What was the subject of that?

A. That was a—call it a seascape. It showed the scene from the landward side.

Q. How large was it?

A. A little larger—I would say that was twelve by eight or nine—fourteen, maybe. [131]

Q. Where did it come from?

A. It was again my wife's property before we were married.

Q. When was the last time you saw it?

A. The same answers that apply to that as apply to the etching, exactly.

Q. So that the same conclusion could be drawn, that you don't remember?

A. The same conclusion could be drawn that I saw it in the latter part of the Evans' occupation.

(Testimony of Donald McKittrick.)

Q. By the way, Mr. McKittrick, what is your business or occupation?

A. I was on the faculty of the University. I took out a leave about a year or two ago.

Q. University of California? A. Yes.

Q. In what department?

A. I am a biochemist. I was in the College of Agriculture, interested in research.

Q. Are you at present employed?

A. That's right.

Mr. Spohn: I have no further questions.

The Court: Any further questions?

Mr. Cornish: No. You can step down.

(Witness excused.)

The Court: Mr. Cornish, how long do you anticipate you will [132] be on direct examination of Mrs. McKittrick?

Mr. Cornish: Maybe fifteen minutes.

The Court: Well, let's proceed with the direct examination. We may have to go over until tomorrow on this matter. I presume you are going to have some rebuttal testimony, are you?

Mr. Spohn: If your Honor please, within your own convenience we would like very much to conclude the matter. Mr. Wilson has an engagement before the Department of Labor tomorrow morning which was put over from today. We will limit our rebuttal as much as possible in order to submit the matter.

The Court: Well, we will proceed to try to get the matter submitted.

Mr. Spohn: Thank you.

BARBARA McKITTRICK

one of the defendants, called in her own behalf, having been duly sworn, testified as follows:

The Clerk: Will you state your name to the Court?

The Witness: Barbara McKittrick.

Direct Examination

By Mr. Cornish:

Q. And you are one of the two defendants, are you, Mrs. McKittrick? A. Yes.

Q. Where do you live?

A. In Walnut Creek.

Q. And you and your husband own the home in Walnut Creek? [133] A. Yes.

Q. And will you just describe the property?

A. My mother owned that home.

Mr. Spohn: May I make the same objection to this line of testimony that I made before, based on the same considerations of the irrelevancy and incompetency and——

The Court: Along the same line, yes. The same objections will be made—the same ruling will be made and your motion to strike for the line of testimony, and I will reserve ruling on the motion.

Mr. Cornish: And I call your attention to the fact that in cross-examination of Mr. McKittrick,

(Testimony of Barbara McKittrick.)

counsel himself questioned Mr. McKittrick as to the same circumstances without any objection on our part, and I think he has waived his motion.

Mr. Spohn: I believe that is erroneous. I asked him nothing whatsoever about Walnut Creek.

Mr. Cornish: I beg your pardon; you asked him about the offer that was made and the rent that was to be paid, the \$180.00 per month. I distinctly heard you.

The Court: Well, let the record speak for itself; and as to this witness, the motion stands, and the question of whether or not you have waived anything is not before me at this time, and I am not going to rule on it until I look at the evidence. I might say here, parenthetically, that I don't recall going into it, but if he did, that can be argued. We will see how it [134] develops.

Q. (By Mr. Cornish): Will you just describe this place in Walnut Creek, Mrs. McKittrick?

A. Well, it has a big garden and has four houses on it. One is a kind of—one, we had built when we moved out there. It was kind—used for storing things, and the other had a two-story building with a library upstairs, and a bedroom downstairs; and the other is a servants' quarters or something like that; and, anyway, it's a room and closet and bathroom and storage room and double garage. It's a good-sized building; and then there is another building where the kitchen and living room and dining room and bedrooms are, and some porches are, and

(Testimony of Barbara McKittrick.)

the main advantage is the garden. That is the most attractive part.

Q. Excuse me. The property surrounding it is about what area?

A. Well, it's about nearly—something like seven acres—between six and seven acres. I think it's six and three-quarters acres.

Mr. Spohn: May the witness be instructed to speak a little more loudly?

Mr. Cornish: Can you speak up?

The Witness: It is about six and three-quarter acres.

Q. (By Mr. Cornish): Now, at or about the time that you met the Wilsons, did you have any inquiries for renting the property in Walnut Creek?

A. At the time we met the Wilsons? [135]

Q. At or about that time.

A. Yes, just before the Wilsons came out, we had had not only an inquiry, but an offer of some people to rent the house, asked us if we could and would take \$180.00 a month and let them move into it.

Q. Now, that was how long before you met the Wilsons?

A. Well, it was just before, because we had already listed it at a real estate place.

Q. You say you listed it?

A. We listed the house at the real estate place and then we decided that we couldn't afford to rent it at one hundred ten, and so we thought we

(Testimony of Barbara McKittrick.)

would take this other offer and move back into it.

Q. Now, you said you listed the house. Which house are you referring to, the Walnut Creek?

A. Oh, no. We hadn't the time to list that. It was just offered at the time the Wilsons came out and asked that if they paid an extra bonus, would we please rent it to them. And so, instead of moving back ourselves and accepting this offer, we allowed them to do that.

Q. All right. Now, before this—you were offered the \$180.00 per month rent for the Walnut Creek house, before that had you listed the Oakmont property for rent? A. Yes, we had.

Q. Do you know how many brokers that had been listed with? [136]

A. No, I don't remember.

Q. Did you handle the listing?

A. Oh, I handle everything in connection with the house.

Q. All right. At what price or what rental did you list it? A. One hundred ten.

Q. One hundred ten. Now, the tenant that was in possession at that time was paying what rent?

A. Mr. Evans?

Q. Yes. I mean before the Wilsons came.

A. He was paying one hundred ten.

Q. And from the time that you first rented this property in August of 1944 up to the time you met the Wilsons, it had always been rented on a lease, had it not?

A. No, I don't think it was always on a lease.

(Testimony of Barbara McKittrick.)

It was a month-to-month rental in some cases, because some of them didn't stay a year.

Q. It was a written agreement?

A. It was a written rental, yes.

Q. A written rental agreement? A. Yes.

Q. Now, it originally was rented at \$150.00 per month? A. Yes.

Q. And then, following the reduction ordered by the Area Rent Control, and up until the time the Wilsons came into the picture, did you charge more than \$110.00 per month? [137]

A. No, we didn't.

Mr. Spohn: I object to that. It is beyond the issues of this proceeding. We are only concerned with the rental that was charged. The tenants Wilson know what the predecessors were charged.

The Court: The objection is sound. I don't see the materiality. There is no allegation here made of any violation.

Mr. Cornish: I think, your Honor, that what has been the practice of these people in the past and whether Mr. Wilson was the one that brought about this violation, whether he was the one that induced it, is certainly material when this Court, in the exercise of the processes of equity, should order restitution, even though the statutory rights have long since passed.

The Court: Well, I am not going to rule the answer out. I will allow the question and answer to stand, but I will say to you, I don't want you to go

(Testimony of Barbara McKittrick.)

further into the field, because I don't think it's material. You have established your point.

Q. (By Mr. Cornish): Now, until Mr. Wilson—until you first talked to Mr. Wilson, had you any idea of renting the Oakmont property for \$110.00 per month?

A. Until I talked to the Wilsons, well, no, we just didn't know what to do. Prices were going up and I knew I couldn't get any more than one hundred ten. I just didn't. We didn't think we should continue any longer, and yet we didn't think we could get any more; and until this offer was made for the place in [138] Walnut Creek, we thought we had better rent it again. And then when we found out we could do better by renting the Walnut Creek place and moving back, we thought that was the wise and best procedure.

Q. You had determined in your mind that you and your husband would move back to Oakmont?

A. Yes.

Q. Before the Wilsons came into the picture?

A. Oh, yes. We told them that.

Q. Now, when the Wilsons came out to the house, did you discuss with them—just relate, if you will, as best as you can recall the conversation, that you had the first time the Wilsons came to the house.

A. We had this offer. When the Wilsons came to the house, we told them that it was no longer for rent. They said something about some other prospective tenants going to come out that hadn't come.

(Testimony of Barbara McKittrick.)

We wouldn't let anybody come out at that time. It was definitely established in our mind that we were going to move back into it again, so they were the only ones that came out, and when they came out, we told them it was no longer for rent, but we hadn't yet had time to telephone the various real estate people and tell them that it was now off the market. But instead—and we told them that was what we were going to do, but they really begged us to let them rent it and give us—and they wrote out a check for \$300.00 and said, "Wouldn't this be a [139] sufficient inducement? We think that the house is well worth that price and we have no objection whatsoever to paying it." And they thought that it was underpriced at one hundred ten, as all the real estate people seemed to think, and everybody that looked at it thought, that it wasn't quite high enough.

Q. Now, did Mr. Wilson write out that check the first time he came out to the house, or the second?

A. Well, he offered it the first time. I don't remember.

Q. When did you first see the check, the three hundred?

A. I can't remember whether that was the first time, or when he wrote that check. I just can't quite remember whether that was the first instance.

Q. You do recall, however, that Mr. Wilson offered to pay rent at the rate of one hundred thirty-five a month on the first occasion?

(Testimony of Barbara McKittrick.)

A. Yes, that was the only reason we considered doing it, although I didn't like to do it like that, either, I was afraid.

Q. Now, did you give Mr. Wilson a definite answer the first night he was there?

A. No, I don't think we did. No, I think not.

Q. Do you recall the statement Mr. Wilson made as he left the house that night? A. Yes.

Q. What did he say?

A. He said, "Please, let us buy your—please let us rent your [140] house," or something like that. He was very anxious to rent it, and so was his wife.

Q. All right. Now, did you get in touch with the Wilsons, or did they get in touch with you following the conversation?

A. They called us again after that and begged us some more, and we had been talking it over.

Q. Now, just a moment, Mrs. McKittrick. Did you get in touch with them, or did they get in touch with you?

A. No, they called us on the telephone.

Q. They called you on the telephone?

A. Yes.

Q. And then, did you call them at any time from the time that you first met at your house and the second time you met, or did they call you?

A. No, we didn't call them between the time we saw them and when they called again and made an arrangement to come out and see us again.

Q. And then they came out on the 13th of July?

A. Well, I guess it was the 13th of July.

(Testimony of Barbara McKittrick.)

Q. Well, they signed a lease on that occasion, and that lease indicated the same day it was signed?

A. It was dated the same day it was signed.

Q. Now, then, do you recall the conversation that occurred on the second day that they came out, on the day the lease was signed? [141]

A. I am confused. What did you say?

Q. Do you remember what was said?

A. What was said the second time they came out?

Q. Yes.

A. To Walnut Creek? You don't mean——

Q. The second time they came out to Walnut Creek.

A. They just begged us again to rent it for that price, and that is all; and I don't know whether it was agreed over the phone to rent it, and that we would accept the three hundred, or whether we decided that after they had got that—I can't quite remember, but in any case, it was consummated the second time they came out.

Q. All right. Now, at that time, at the time that Mr. Wilson gave the check, there was no O.P.A. rental regulations in force?

A. No, that was one of the reasons that they say it would be all right. They said, "Well, there isn't any O.P.A. now. We are perfectly—there is nothing underhand." I was afraid that I was doing something that I could go to jail for, or something, and I said I didn't want to do it now, and they said, "There is no O.P.A. in function at all now,"

(Testimony of Barbara McKittrick.)

and that, "I can certainly give you this three hundred," and——

Q. Mr. Wilson said that, did he?

A. Mr. Wilson said that. So he gave us—and handed to my husband, I think, the check, and there wasn't any O.P.A. then, and that made me feel a little better. [142]

Q. Then, subsequent to that, the Area Rent Control regulations went back into effect?

A. Yes, and so I said—well, it was automatically——

Q. Now, then, you accompanied your husband to the house—to the Oakmont house to talk to the Wilsons some year and a half or more after the lease was first signed?

A. I—at the end of the year, I said to my husband, "Now, what are we going to do? What should we do?" He said, "We should talk to the Wilsons again," and I tried about five times to get in touch with Mr. Wilson, but Mrs. Wilson said he was very busy—and I know he was. He had a new furniture business or something like that in San Francisco that he was moving into, and he said he was working nights, he couldn't see me in the evening or daytime, and we let several months go by. I don't remember whether it was three, four or two, but I think it was three or four months; and then we went over to see them and he said—as my husband quoted him as saying—"This is perfectly agreeable, the set-up that we have at the present is perfectly satisfactory with me. I think the house

(Testimony of Barbara McKittrick.)

is worth one hundred thirty-five and I am perfectly willing to continue paying it," so that was all.

Q. And it was at that time that the extension agreement was signed? A. Yes.

Q. Then, up to that time that the extension agreement was [143] signed, how many checks had you received for \$135.00 per month?

A. I don't remember how many months. I don't think there is any record of what it was. I know it was several. That is all I can say—maybe three.

Q. You mean more than one?

A. Oh, yes, definitely. It may have been four or—I can't just remember whether it was three or four or five or something like that—several months. That is the best I can remember.

Q. Now, did you ever ask Mr. Wilson to send more than \$110.00? A. No, I never did.

Q. And these payments up to the time that the lease—that the extension was signed, came in each month? A. Yes.

Q. All right, as to the payments since that, did you ever ask for more than \$110.00 per month after the extension agreement was signed?

A. No, because it wasn't necessary. They just kept on paying. I mean, they kept on paying; no reason to discuss it. I knew they understood the arrangement. They just kept on staying.

Mr. Spohn: What was that answer? I couldn't hear it.

The Witness: They just kept on sending it.

(Testimony of Barbara McKittrick.)

Q. (By Mr. Cornish): Now, did you or did your husband in your presence ever telephone the Wilsons that you either had applied or were going to apply to the Office of Price Administration or the [144] Area Rent Control for an increase in the rent?

A. No, I did not telephone. I did not, because I had already. They had come out once and they had set it from one hundred fifty down to one hundred ten, and I thought that was very low, and I applied again about when the Creedens, or some people were moving in or out—I forget—and it didn't go through. There doesn't seem to be a record of it. I didn't figure that I could get it, and so I definitely did not make any suggestion. I forget what you said now.

Q. Now, from the time that you made this second application——

A. I didn't tell them that there was any application made, because there wasn't. There was no——wouldn't there be a record of it at the O.P.A.? I didn't make any—I didn't request any, and I didn't tell them I was going to.

Q. All right. Now, then, during any of the time that the Wilsons were in possession, did you make any request of the Area Rent Control for an increase in the rent?

A. No, no, I did not.

Q. Did you when the Wilsons moved out?

A. Yes, I did.

Q. Did you rent to a new tenant after the Wil-

(Testimony of Barbara McKittrick.)

sons moved out before making the petition for an increase in rent?

A. Would you say that again?

Q. Did you rent to a new tenant after the Wilsons moved out before you made your petition for an increase in rent to the [145] O.P.A.?

A. No. A real estate man told me that the O.P.A. was now substantially increasing, whereas they had not done so in the past, and they thought I would be wise to apply again, and so I did apply again and it went through; and then we rented the house to the present tenants. Is that what you want to know?

A. Yes. Now, the increase was to \$130.00 per month?

A. I wanted to be fair and I thought, well, I didn't know what it was worth, although I was advised I could get more, but I didn't want to charge more. Well, I thought it would be around \$130.00—would be a fair price. Maybe it was; I didn't know. I am not a real estate person, but I only asked for one hundred thirty and it went through.

Q. All right. Now, did you at the time that the Wilson moved in—did you check over with them the inventory that is referred to in Plaintiff's Exhibit 3? Did you check over those items in that inventory with the Wilsons?

A. No, I didn't. I should have, but I didn't.

Q. Did you check them over before the Wilsons moved in?

A. Did I? You ask them; I can't remember, I

(Testimony of Barbara McKittrick.)

did it with so many tenants and I can't quite remember. I know that when the Evans moved out, they asked me—they said they hadn't used any of my things, would I please dispense with digging everything out, silverware and dishes and everything—and I liked them very much, and I knew they were trustworthy and I did not. [146] I should have. I saw the things myself and I know some things were there. The rug that my husband was referring to, I did see, and the rugs—and I saw the pictures and I saw some things, but I didn't check through with Mrs. Evans when she left, so I don't know. There may have been some things like dishes and things I didn't—I don't know. There might have been other things. I don't know whether Mrs. Evans took them. I couldn't truthfully say, because I did not check. I don't know—really don't know.

Q. Were these furnishings or furniture the topic of discussion between yourself and the Wilsons?

A. No, I never mentioned it to them. I didn't think I——

Q. Did you mention bringing any of those items down into the house or taking any of it out of the house or keeping any of it? A. No, no.

Q. You didn't yourself? A. No.

Q. Now, in what condition was the house when the Wilsons moved out?

A. When the Wilsons moved out, there was not anything in the downstairs part—but very little. They were right when their attorney said that my

(Testimony of Barbara McKittrick.)

husband has been in and out of the house much less than he has. We both have. And, to him, it wasn't clear what furniture was there and what wasn't. I was the one that took care of that, and I think most all of it was stored in [147] the attic or in the basement. There were just a few pieces oh—in the—I think, as he said, in the breakfast room, furniture, and the kitchen things; and then there might have been a piece or two—but mostly all empty.

Q. Was the davenport in the house—in the living quarters of the house when the Wilsons moved out? A. No, it was in the basement.

Q. All right, what did you do with the furniture after the Wilsons moved out?

A. What did I do with their furniture? We had a man that was working for us and we had him come out and he—I can't think how we got that davenport up, to tell you the truth, whether it was he, or I, or whether we hired somebody else to get that one piece—I guess it couldn't have been my husband, because he doesn't remember. I can't remember it too well, anyway.

Q. Did you——

A. We had to pull all the furniture, take it down from the attic. The things were—the rugs were rolled in the attic, with the exception of one rose-colored Oriental—American or Oriental that was put on the pool table in the basement, and that was on the basement table—on the pool table. The other rugs, the broadloom rug and the dining-room

(Testimony of Barbara McKittrick.)

rug rolled upstairs in a roll, and all the edges—he didn't see them until I took them down and unrolled them on the floor downstairs, but he [148] could tell by looking that the whole edges were all gone. The moths had eaten the edges and quite far back, about six or eight inches back from the edge and all the rugs that were rolled up there——

Q. All right, what damage was done to the other furniture?

A. There wasn't too much. Well, there seemed—they seemed to be scratched badly from having been stored, and we had a man re-surface them. He had to sandpaper them down and do something or other with them in bringing—making them smooth again and putting on the stain and whatever else he put on them. A mirror, two chairs—I mean, a great big mirror that stands on a floor and in a frame, the grandfather's clock that was badly knocked about, two chairs. I think that is all, and I weave—I know how to weave Oriental rugs because I have done some of it, and I wove back the knots in the rug, and it took me about three weeks solid work, weaving back, and one of them was so bad I couldn't do it, and I turned it underneath and hemmed it so that there was a border along the edge still.

Q. What was the condition of the davenport?

A. It was thoroughly chewed up with moths, and I removed that. It was mohair, and it stuck out, and I took some silk yarn and patched it as well as

(Testimony of Barbara McKittrick.)

I could. I fixed almost all the moth holes so that it would look like something. It was badly——

The Court: Counsel, how much longer will you be on the direct examination? [149]

Mr. Cornish: About a minute.

Q. Now, Mrs. McKittrick, realizing that you did a lot of repairs yourself of the rugs, and of the furniture, what, in your opinion, was the depreciation in value of the furniture and furnishings in the house, resulting from neglect and the failure of the Wilsons to take care of the furniture?

A. You know, really, I can't answer that question. I don't know. I haven't bought any furniture—I don't think I have ever bought any. I don't know. I just don't know what the price was. It was an expensive davenport. My mother gave it to me. She furnished my house when I was married, and I really don't know just exactly what it would be. I don't know. It wasn't a good davenport and I don't think anybody would have bought it the way it looked. It was the cushions, and they were both moldy on both sides of the cushions.

Q. Well, aside from your own time and skill in repairing the furniture, what was your total expenditure for repairs and cleaning the place out?

A. I don't know. I know we paid the man \$50.00 extra, because he worked in the evenings, too. I don't remember. I don't remember now. Let's see. There were things, of course, that had to be bought, you know, little polish and yarn, and cleaning bills and things like that, but I don't—I have

(Testimony of Barbara McKittrick.)

never thought to add it up. My husband took care of that.

Q. All right. Now, there were two pictures missing when the [150] Wilsons moved out?

A. Yes.

Q. Would you describe those?

A. One was a little small etching, signed by Piazzoni, and it was in a small narrow gold frame, hanging by the radio, right near the front door. The other was a large—well, it was in a large frame, a watercolor about this big (indicating)—of a sea, with waves, and white sandy beach, and that was in a big frame, and altogether, it was about that (indicating) big, and it hung over the mantel; and I saw that while the Evans were there, and I think they took that down and stored it in the attic in a large box. I saw some things and those happened to be in some that I did see. I was going to take them out to my place in Walnut Creek because I liked them so well.

Q. Were these pictures there when the Wilsons moved in?

A. When they moved in—or whether they were taken inadvertently. They weren't there when they moved out, that is all I know.

Q. What did you value the watercolor at?

A. I really don't know. I don't know much about what it would be. I haven't any idea.

Q. I don't mean what it would sell for. What do you value it for yourself?

(Testimony of Barbara McKittrick.)

A. I liked it very much. Well, I guess \$200.00 would have been right. [151]

Q. What figure did you value the etching at?

A. Well, somewhere the same. They were very lovely little pictures.

Mr. Cornish: I have no further questions, your Honor.

The Court: It is a way over time. Do you have any cross-examination to make of this witness?

Mr. Spohn: Well, I will tell your Honor what points I have in mind. Perhaps we can resolve them rather informally and get them over with.

The Court: What points do you have in mind?

Mr. Spohn: Well, particularly as to the—this \$300.00 transaction. Is the Court interested in hearing anything more about the circumstances of the circumstances of that?

The Court: I am not particularly interested. I think that the evidence is rather clear. There are some conflicts in the testimony, but I think that this witness is merely corroborative of Mr. Wilson's testimony—rather, of Mr. McKittrick's testimony.

Mr. Spohn: Had we the time, and appreciating your Honor's patience in the matter, I would go into that, but if the record is sufficiently clear in your Honor's mind at this point on it——

The Court: Well, if you have anything to develop on it, you had better develop it, though. Let me, before we get into this cross-examination—I think we ought to take a short recess. We have

(Testimony of Barbara McKittrick.)

overrun the Reporter here, and we will take a five-minute recess and we will come back and go at this properly.

Mr. Spohn: I will appreciate your Honor's indulgence to that extent.

The Court: I want to get the matter disposed of, too.

(A short recess was taken.)

The Court: Mr. Spohn, proceed with the cross-examination.

Cross-Examination

By Mr. Spohn:

Q. Mrs. McKittrick, how old is the house at 111 Oakmont Avenue?

A. Well, I don't know. All I could do is guess. When we moved in, my daughter was a year and a half old. When we moved in it was four years old. Can you figure it out?

Q. You would say that is approximately 25 or 26 years? A. Yes.

Q. That would be 1924 or 25? A. Yes.

Q. How long was the furniture in the house?

A. Some of it was sort of antique, antique type of furniture, various clocks and various things. You would call them antiques, at any rate.

Q. Did you buy the furniture at that time?

A. No, most of the furniture was my—my grandmother collected antique furniture and they left most of that furniture to me. My mother gave me some and my grandmother left me some.

Q. So that some of it, a considerable portion of it, was older [153] than the house, is that it?

(Testimony of Barbara McKittrick.)

A. It wasn't this modern furniture. Older than the house?

Q. Yes.

A. Well, the davenport, my mother bought me after they bought the house for me, a Christmas present one year, and it was a good davenport; but the rug was new—I mean.

Q. New when?

A. Well, it was way newer than the house, some of those rugs.

Q. Well, would you say 1930?

A. No, it was even since then, I think.

Q. 1935?

A. I think it was somewhere along there.

Q. 1935? A. Yes, 1935.

Q. How long did you live there—or let us say this: According to the registration statement which you made in September of 1944, which is in evidence as Plaintiff's Exhibit No. 1, the house was first rented in August of 1944, and had been previously owner-occupied, is that correct, to the best of your recollection? A. Yes.

Q. So that the premises had been rented since about August of '44, is that right?

A. The premises had been rented.

Q. Since about August of 1944? [154]

The Court: That is the Oakmont Street property.

The Witness: You mean it had been rented before that?

The Court: No; from that time on.

(Testimony of Barbara McKittrick.)

The Witness: Yes, yes, yes; entirely, yes.

Q. (By Mr. Spohn): Now, you say there had been a number of tenants between the time that it first went on the rental market and the time that the Wilsons moved in?

A. There had been several tenants. I think I could list them.

Q. And you recall that you said the tenants immediately preceding the Wilsons were named Evans, is that right? A. Yes.

Q. Now, do you recall how long the Evans were there? A. About a year.

Q. About a year? A. It was just a year.

Q. Then, say, approximately from July, '45, until July of '46? A. Yes.

Q. Now, do you recall what furniture was in the house when the Evans moved out?

A. Out? There wasn't any downstairs, very little. As I say, it was stored away.

Q. Stored away?

A. Yes, I looked at it while she was there several times and she had it very carefully stored with these drapes and blankets and things over it. [155]

Q. Did you go in the premises between the time the Evans left and the time the Wilsons moved in?

A. I don't know. I don't think I did. I think they said they were anxious to get—I don't think so. I don't know, they had no—I don't remember. Did I go in? Q. Do you recall?

A. I don't remember. Maybe I did.

Q. To the best of your recollection, Mrs. McKit-

(Testimony of Barbara McKittrick.)

trick, what furniture was in the living quarters of the house when the Wilsons moved in? By the "living quarters of a house," I mean, as I said, when your husband was on the stand, in the rooms in actual use which were occupied.

A. There wasn't any—very little.

Q. Very little?

A. Just like, as I said, the breakfast room table and chairs.

Q. That was that wicker set, wasn't it?

A. Yes.

Q. And then there was a stove, and a——

A. Yes.

Q. ——and a refrigerator in the kitchen?

A. There might have been a piece or two, but it seems to me it was pretty well empty.

Q. And then there was a rug in the front room?

A. That rug in the front room, they had down on a pool table in the basement. [156]

Q. The Evans had it downstairs? A. No.

Q. I am trying to get the picture——

A. There were so many tenants in and out.

Q. ——as to just what was being used for living purposes—— A. Yes.

Q. ——by the tenants at the time the Wilsons moved in. In other words, what was there in use for living purposes?

Mr. Cornish: I am going to object to this line of testimony on the grounds it is incompetent, irrelevant and immaterial. I don't see what difference it makes. The property was listed with the Office of Price Administration, and it was a furnished house,

(Testimony of Barbara McKittrick.)

and it is admittedly there if the tenants saw fit to use it. I don't see what difference——

The Witness: They asked me, "Please leave it in the attic where it is stored, and in the basement," because they had their own furniture, so I did. I didn't ask them to go to the trouble of taking it downstairs again, because——

The Court: Just a moment; now, to keep the record straight, I am going to overrule the objection. At least it will go to the question of damage. Now, you have gotten to it pretty well already. That is, you have gotten to the facts as they are.

Q. (By Mr. Spohn): Now, your husband has testified, Mrs. McKittrick, and you have testified about the damage that had been done to the furniture and about what steps had to be taken to repair it. [157] Now, to the best of your judgment, what was the total amount of damage done to the furniture?

A. It's an awfully hard question. It seems to me it would come to something. I don't know how much my time would be worth. I just don't know. It would have amounted to quite a little bit, I would say. I don't know.

Q. Do you recall——

A. I would have to say I don't know.

Q. Do you recall specifying an amount something in excess of \$1,225.00? A. Did I what?

Q. Do you recall specifying that the amount of damage was something in excess of \$1,225.00?

A. In excess of that? No, I don't think I did.

(Testimony of Barbara McKittrick.)

Q. Do you remember making any such statement?

A. No, I didn't put any price on it. I didn't know what the damage was worth.

Q. Do you recall discussing that matter with Mr. Cornish at the time?

A. My husband did; I didn't. My husband, I believe, discussed with him what he figured the damage to the property was. I don't think I did.

Q. Well, to the best of your recollection, what would you say was the total amount of damage?

A. See, these things were ruined, and if I had to buy them [158] over again, it would have been over a thousand dollars easily with the price they are now. It's awfully hard.

Q. How much did it cost to repair them?

A. See, they were so badly damaged, they aren't worth anything. If you don't count my time as anything, do you mean?

The Court: Giving a reasonable value to your time.

The Witness: How much do people get?

The Court: Well, the witness has said she doesn't know.

Mr. Spohn: We will not press it any further.

Q. Now, directing your attention from the furniture to these paintings, I believe your husband testified that there were two paintings that were missing after the Wilsons moved out, is that correct?

(Testimony of Barbara McKittrick.)

A. After the Wilsons moved out, there were two paintings missing, yes.

Q. One was a watercolor painting and the other was a drypoint etching? A. Yes.

Q. And in response to a question as to what their value was, or how old they were, or where they came from, he said they were your property?

A. They were wedding presents to me, my first wedding.

Q. Have you any estimate—personal estimate as to their value?

A. They came from—well, my people. That is all I can tell [159] you. They were very attractive.

Q. When did you last see those two items? The watercolor—

A. I saw them when the Evans were just getting ready to move. They were packed in boxes. I looked at those particularly. I was planning to take them out to Walnut Creek and substitute in other pictures.

Q. Where were they? A. In a box.

The Court: Where was the box?

The Witness: The box was in the attic.

Q. (By Mr. Spohn): The box was in the attic. Did you ever see them thereafter?

A. No, I didn't. No, I never saw them at all after that. The frame from one of them is up in the attic now, but the picture is gone from it. The glass is still there but the picture is gone, taken from behind it.

(Testimony of Barbara McKittrick.)

Q. The last time you saw them was before the Evans left, and they were in a box in the attic?

A. I don't remember whether they were still there. They were just leaving.

Q. Do you ever remember seeing them while the Wilsons were there?

A. No, I don't remember now whether the Evans had moved at that time or whether they were just moving. I think they were moved; I don't [160] know.

Q. Now, as to the renting of the premises to the Wilsons, do you recall the conversation that was had by your husband and yourself, and Mr. and Mrs. Wilson, about the amount of rent to be paid for the house?

A. Is this the first time?

Q. Yes.

A. We told them it wasn't for rent any more because we were going to move back again.

Q. Had you decided that it wasn't for rent?

A. We thought that when these people offered us \$180.00 for it——

Q. You are talking about the \$180.00 for the Oakmont property?

A. Oh, no, I am talking about Walnut Creek.

Q. When did you receive that offer?

A. Well, we received that——

The Court: Now, which are you talking about?

Q. (By Mr. Spohn): I would like to enquire——

The Court: She said she is talking about the \$180.00 for the Walnut Creek property.

(Testimony of Barbara McKittrick.)

Mr. Cornish: May I call your attention to this line of questions which was the same as was asked Mr. McKittrick.

The Court: The question counsel asked this witness was a question about the Oakmont property, and she answered by referring to the Walnut Creek property.

The Witness: I didn't understand. [161]

The Court: And I want to point out to you that he did not question her about the Walnut Creek property or the price that was asked. It came up in an answer from the witness when she was attempting to explain something, nevertheless. Now, that is why I asked you this question about which property you are talking about.

Mr. Spohn: Yes, I am trying to get at the rental on the Oakmont property.

The Court: Naturally.

Mr. Spohn: And, as you observed, the answer was given on this Walnut Creek property.

The Court: Yes. Well, she says that they decided that they weren't going to rent the Oakmont property again. Isn't that correct?

The Witness: Yes. When the Evans moved out, we didn't know whether we should continue renting at one hundred ten, or what we should do. I listed it. Is that what you want to know?

The Court: I want to know——

The Witness: I cancelled it.

The Court: ——when you decided that you should not rent the property again.

(Testimony of Barbara McKittrick.)

The Witness: Well, as soon as we got the offer.

The Court: For the Walnut Creek property?

The Witness: The Walnut Creek property, then we decided we definitely would not rent the 111 Oakmont property, but would [162] move back into it. It was more convenient for my husband, and it——

The Court: That has been her testimony, the sum and substance of it. She may be a little indefinite in the way she says it, but that has been the sum and substance of it all the way through.

Q. (By Mr. Spohn): Now, do you recall how the Wilsons first happened to get in touch with you about renting the Oakmont property?

A. Well, they called up. I think what she said, they called the Evans, I think, and found out from them how much it was, and then called us; I don't remember.

Q. Who called you? Do you recall?

A. Mrs. Wilson called me.

Q. And Mrs. Wilson spoke to you?

A. Yes.

Q. All right. Now, do you recall what she said?

A. Not exactly. She said she wanted to rent the house; she had seen it—and I think she said she had seen it at that time, liked it and wanted to rent it.

Q. Do you recall what you told her?

A. And at that time, I told her I didn't know what to do, I would have to talk it over with my husband. We didn't know what to do. I said I

(Testimony of Barbara McKittrick.)

didn't know if I wanted to rent it again or [163] what.

Q. At that time, the matter was still open?

A. Well, it was—I think the Evans had been out about—I don't remember how many days, when we got—this man came out and gave us an offer to rent our place out here at \$180.00. It was just about the time that the Evans contacted—I mean that the Wilsons contacted me to rent my house there, and when we got——

Q. Did you tell the Wilsons that the Oakmont property was not then on the rental market?

A. The first time they phoned—I can remember we told them one time. I don't remember whether it was the first time or the second time. I can't remember now whether it was the first time or second time, but——

Q. At the time that Mrs. Wilson called you——

A. I believe it was the second time. I believe it was after she called first that we got this offer of one hundred eighty; and then the second time when he came out, we told them it wasn't going to be rented again. I think that that was it, but I can't quite remember how that worked in. I just can't quite remember. I don't know; we told them it wasn't—no, it definitely wasn't.

Q. When did you tell them it was not in the rental market?

A. The first time or the second time they came out?

Q. Yes.

(Testimony of Barbara McKittrick.)

A. Maybe my husband remembers. I think it was the second time; [164] I don't know.

Q. When was the amount of rental specified, at the first conversation?

The Court: When you talked about the amount of rental.

The Witness: I don't really remember whether it was the first time or the second time. I don't remember. If we had received the offer for one hundred eighty before they came out, then we must have told them the first time they came out. If we received the offer between their visits, then we told them the second time. That is the best I can say because I really don't remember.

Q. But you are not quite certain as to whether——

A. It was just after we received—I don't know, I don't remember when we received that offer—between their first and second visits, I don't remember.

The Court: Well, tell me this: what counsel is trying to get at is, when did you finally agree on a rental price to be paid for the Oakmont property by the Wilsons?

The Witness: You mean before the first time or second?

The Court: No, I want to know when, in your mind, do you recollect that the rental was concluded, that is——

The Witness: I didn't think so until I saw the \$300.00 check he had written out. Whether it was

(Testimony of Barbara McKittrick.)

the second time or the first time—that was the second time, I think. I think that was the second time. I didn't try to remember it. I am [165] sorry. I just don't remember whether this was the first time or the second time, but he wrote it and handed it to my husband. That is when the lease was signed.

The Court: That is when he signed the paper?

The Witness: Yes.

Q. (By Mr. Spohn): Well, now, you recall, I assume, Mrs. McKittrick, the original lease that was entered into?

The Court: Are you referring to defendants' Exhibit C?

Mr. Spohn: Yes, to defendants' Exhibit C.

The Witness: That is all my husband's handwriting. I didn't take care of that part of it.

Q. (By Mr. Spohn): Is that your signature, "Barbara McKittrick"? A. Yes, that is.

Q. Now, directing your attention, particularly, Mrs. McKittrick, to the lower part of the first page of the lease, concerning the term of one year running from the 13th of July, '46, to the 13th of July, '47, at the rent, or sum of \$1620.00, in words, and in figures, and then the "16" scratched out in each instance and the "13" in words written over one place, and the figures "1320" in the other. Do you recall the circumstances of that change?

A. No. My husband was talking about it in the hall. He can't remember just how that came about. It is his writing. I don't know. Do the Wilsons know? [166]

(Testimony of Barbara McKittrick.)

The Court: She says she doesn't know.

Mr. Spohn: All right.

Q. Now, do you recall, Mrs. McKittrick—that is, do you presently recall to the best of your present recollection, the conversation about the amount of rent that was to be charged for the premises?

A. Do I remember—well, I know that I told him that we weren't going to rent it then, and they said just what I already said, and she said that they wanted it very badly and would we please rent it to them, and if they gave us the check for \$300.00, and they said they thought it was worth one hundred thirty-five and there was no O.P.A. and it wasn't illegal, and for us to take it.

Q. Then, is it your testimony that the \$300.00 offer came from them?

A. The offer—they suggested the \$300.00, yes.

The Court: Let me ask this question at this point and see if I understand.

Q. Did they suggest the \$300.00 to make the total rental \$135.00 a month?

A. You mean, now that I—yes, they did. Yes, they did. She said they thought the house was worth hundred thirty-five. They said, "I think the house is definitely worth one hundred thirty-five." He said that, particularly, and so did she.

Q. Now, Mrs. McKittrick, you have testified they said they [167] thought the house was worth one hundred thirty-five, but they gave you a check for \$300.00?

A. Yes.

(Testimony of Barbara McKittrick.)

Q. Now, do you recall the circumstances of how they happened to give you a check for \$300.00?

A. Yes, I did.

Q. What were those circumstances?

A. He said there was no O.P.A., but if the O.P.A. went back, it would look back at the checks coming in that were exceeding the regular rent, and that it would be better, because he said he would be equally guilty as doing that, and that he wanted to do it that way. That was his idea and so he did it.

Q. Who said that? A. Mr. Wilson.

Q. Now, when was that?

A. I don't know whether it was the first or second time. I am awfully sorry.

Q. Was it one of those two meetings?

A. Yes.

Q. (By Mr. Spohn): And you are quite certain that it was Mr. Wilson who said that?

A. It was Mr. Wilson, yes.

Q. Now, do you recall any discussion with them as to the so-called O.P.A. rent ceiling on the house?

A. Well, I told them that it had been rented first at one [168] hundred fifty, and the O.P.A. had reduced it to one hundred ten. Is that what you are getting at?

Q. Well, do you recall telling them that the rental ceiling was then \$110.00?

The Court: She so said just now.

The Witness: Oh, yes, I told them that.

Q. (By Mr. Spohn): Do you recall saying anything to them about having asked the O.P.A. for an increase?

(Testimony of Barbara McKittrick.)

A. No, I didn't say that to them, because I hadn't asked the O.P.A. at that time for an increase.

Mr. Spohn: I think I have no further questions.

The Court: Any further questions, in view of the cross-examination?

Redirect Examination

By Mr. Cornish:

Q. Mrs. McKittrick, when the Wilsons went in, they signed an inventory, did they not?

A. The Wilsons signed an inventory after they had been in a little while, yes.

Q. And they delivered that inventory to you with the signatures on it?

A. I think they made it, or gave it, yes. We have it.

Q. That was the same inventory that had been signed by the previous tenants, the Evans?

A. Yes.

Q. This document which I hand you, Mrs. McKittrick, is that [169] the inventory which was given to you by the Wilsons, with the signature of one of them attached?

A. Well, yes, yes, uh-huh.

Q. Now, the signature—as I noticed, the two signatures in pencil at the bottom of this——

A. Pencil? No, that is pen.

Q. Evans, that is a former tenant?

A. Yes.

Q. And the "B. Wilson" is the signature of either Mr. or Mrs. Wilson?

(Testimony of Barbara McKittrick.)

A. Yes. I don't know whose signature it is.

Q. After they signed it, they turned it over to you? A. Yes.

Q. And that is the inventory that is referred to in the lease? A. Yes.

Mr. Cornish: We ask that this be admitted in evidence as Defendants' Exhibit next in order.

The Court: It may be admitted. Is that Defendants' Exhibit D?

The Clerk: That is D, your Honor, yes.

(The inventory just referred to was received in evidence and marked Defendants' Exhibit D.)

Mr. Cornish: I have no further questions.

Recross-Examination

By Mr. Spohn:

Q. Mrs. McKittrick, do you recall when [170] that inventory was signed?

A. No, I don't. You mean what date?

Q. Yes, about when?

A. Well, it must have been a little while after.

Q. Was it before or after the Wilsons went into the house?

A. Oh, it was after they went in and checked the inventory.

Q. Did you send it to them, or did you take it to them?

A. I don't remember; I didn't see them very much. I guess I mailed it to them.

(Testimony of Barbara McKittrick.)

Q. Do you recall having written them a letter on or about August 10, 1946, in which you asked them to sign a copy of the inventory and send it to you?

A. I can't remember. Maybe I did; I don't know. Maybe we did.

Mr. Yount: Only the first four lines of this are of any materiality. It is all the government is interested. It is getting very late. The rest is a discussion of family matters, which is not pertinent here.

The Court: Counsel has the right to examine the document in its entirety. We are not going to prohibit him from so doing.

Perhaps I might ask the witness if she recalls addressing this envelope?

The Witness: That is my writing, yes.

Mr. Spohn: May I offer this in evidence as Plaintiff's Exhibit next in order? It is stamped from Walnut Creek August [171] 10, 1946, addressed to Mrs. B. A. Wilson, 111 Oakmont Avenue, Piedmont, California, and bearing the sender's name and addressed in the upper left-hand corner, "B. McKittrick, Walnut Creek, California, Box 1321."

The Court: I think the letter and the envelope ought to go in together.

Mr. Spohn: We will hold it for that.

Q. Do you recall writing this letter about August the 10th, 1946?

The Court: Directing your attention particularly to the first part of it.

(Testimony of Barbara McKittrick.)

Mr. Spohn: The first paragraph is the only paragraph that we are interested in.

A. Well, yes.

Q. Signed on the third page, "Barbara McKittrick." A. That's right.

Mr. Spohn: May I offer in evidence, together with the envelope as Plaintiff's Exhibit next in order, a letter addressed to Mrs. Wilson, and reading in the first paragraph:

"Would you like to sign your copy of the inventory and send it to us and let me add the few items to it which I have entered on mine, or have me mail you my copy to sign?"

Mr. Cornish: Are you offering just that part of the letter, counsel, or are you just reading that part at the present [172] time?

Mr. Spohn: I am offering that paragraph.

Mr. Cornish: I will object to that paragraph, your Honor, on the ground that it is only a portion of the document; and I have no objection to the whole letter going in.

The Court: Do you have any objection to the whole letter?

Mr. Spohn: No.

The Court: Well, it will all be admitted into evidence, and the first portion has been read into the record for whatever purpose you desire to use it, and is a portion of the exhibit.

What is the number of the exhibit for that letter and envelope?

(Testimony of Barbara McKittrick.)

The Clerk: Plaintiff's Exhibit No. 4, your Honor.

(The letter to Mrs. Wilson in regard to the inventory was received in evidence and marked Plaintiff's Exhibit No. 4.)

PLAINTIFF'S EXHIBIT No. 4

Dear Mrs. Wilson—

Would you like to sign your copy of the inventory and send it to us, and let me add the few items to it which I have entered on mine? Or have me mail you my copy to sign?

I keep thinking about little Carol and her striped curtains and all and I do feel awfully badly about it. Couldn't she use our bed room furniture? It contains a little cream colored vanity table and chair and you could get little pastel colored curtains—or are there any of ours you would want to use? I told Donald about the suggestion of Carol painting the walls a solid color, and he nearly hit the ceiling. He happens to dislike plain painted walls.

When the water pipe burst in the attic and spoiled our nice new wall paper and ceiling, Mrs. Evans asked me if she might select the new paper. I agreed at once and we both were more than pleased with her choice.

About the little globe which has blown out in the furnace switch. Could you please ask the P. G. & E. man how much a new one will cost before calling an electrician to replace it, as Donald says he can

(Testimony of Barbara McKittrick.)

screw one in in about 2 minutes and a little globe should cost only a few cents. Sometimes electricians make so much of a small job.

I hope your furniture has arrived safely, and we do both hope that all 3 of you will be very very happy at 111 Oakmont.

Me—I am in the middle of fruit drying. I've dried all the fruit from the 10 apricot trees. It looks enough for 10 armies. Next came the prunes and apples and then the pears. Later still the biggest task of all—the wine making.

We will give you a chance to get settled and then we do want you to come out here and spend a Sunday and have Sunday supper with us, or come for dinner during the week and spend the evening.

I am keeping my fingers crossed that Carol will get into college. She'll love it!

Best wishes to all of you.

Sincerely,

/s/ BARBARA McKITTRICK.

[Envelope]

[Cancelled U. S. 3 cent stamp]

[Post Mark]: Aug. 10, 1946.

B. McKittrick,
Walnut Creek,
Calif., Box 1321.

Mrs. B. A. Wilson
111 Oakmont Ave.,
Piedmont, Calif.

Filed December 28, 1950.

(Testimony of Barbara McKittrick.)

Q. (By Mr. Spohn): Now, Mrs. McKittrick, calling your attention to Defendants' Exhibit D, which is the carbon copy of the inventory on these premises at 111 Oakmont Avenue, would you point out the items which you added pursuant to your letter?

A. Let's see, now. Was that four years ago?

The Court: 1946.

The Witness: I am just trying to think four years ago. It wasn't those pictures; they were wedding presents. I don't—really, I would have to take more time to think. [173]

Oh, I know. This was written up, you see, before. That wasn't on it, so I believe the things are in the handwriting, the ones that I added.

The Court: He wants to point out——

The Witness: I think they will be in pencil, the ones that were added.

The Court: Point out which ones were added.

The Witness: This is one green and pink cotton rug, matched chair pillow, two chairs, bureau, or something, and it says something else.

Q. (By Mr. Spohn): Would you say that all of the pencil notations were those that were added?

A. No, but this writing here, that slanting writing is mine. I added those to the inventory when I put them in the house.

Q. Well, would you point out to the Court where the paintings are specified?

A. I will have to look. Let's see. They are done room to room, and it shouldn't be too hard. I will have to go back in it. Watercolor seascape; that is

(Testimony of Barbara McKittrick.)

one. That wasn't a reproduction; it was an original. I see what you are getting at, it was an original. Well, small gold frame etching. Neither of them were reproductions. I wrote that, too. It wasn't a reproduction, it was an original watercolor painting above the mantel. [174]

The Court: Those were the two items that you were referring to?

Q. (By Mr. Spohn): That reproduction is your writing?

A. Yes, it is; it is my writing—but it wasn't—I just don't know why I put it there. It wasn't, though. I don't know if the ditto was mine.

Q. Mrs. McKittrick, I don't recall now whether you previously testified on this point, but I would like to have it cleared up: Between the time the Evans left and time the Wilsons moved in——

A. Yes.

Q. ——did you check the inventory with the actual items in the house? A. No, I didn't.

Mr. Spohn: I have no further questions.

The Court: Any further questions, Mr. Cornish?

Mr. Cornish: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Cornish: The defendants rest, your Honor.

The Court: All right, the defendants rest. Any further rebuttal?

Mr. Spohn: I would like to call Mrs. Wilson for a short——

The Court: All right, Mrs. Wilson, take the stand. You have been previously sworn. [175]

BEATRICE WILSON

recalled in behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination

By Mr. Spohn:

Q. Mrs. Wilson, do you recall the items of furniture which were in the living quarters of the house when you moved in? A. Yes.

Mr. Cornish: Objected to as incompetent, irrelevant and immaterial.

Mr. Spohn: On the contrary, I think it goes right to the question of this alleged damage.

The Court: It goes to the measure of damages. Proceed. Overruled.

Q. (By Mr. Spohn): What were those items? Will you state them?

A. The rug that they talked about, the good domestic or Oriental was down on the floor in the living room. There is a companion rug that is a hall rug. You come into the hall living room and the rug was always on the floor. In the kitchen were an icebox and a stove. In the breakfast room were the little wicker table and four chairs; and in the little back bedroom was the Chesterfield—and that the Evans had used as a sitting room or a den—and it was there, and we had a man help Mr. Wilson carry that Chesterfield down into the basement, where it was raised up, because it wouldn't go up

(Testimony of Beatrice Wilson.)

the attic stairs. When we moved in, the McKittricks knew that we were not going [176] to use their furniture. That is why the inventory means so little. Mrs. McKittrick came with me and we went up into the attic after the Evans moved out, before we moved, and she said, "Now, here are the things," and we stood there in the center of the room. It is a big attic room. "Here are the things. Do we want to go through all those boxes?"—and I certainly didn't. And there was some sterling silver there but we didn't open it to look at it. It was all listed on the inventory list. So we looked at each other, and she said, "Do you want to sign it?" And I said, "I am willing to take your word for it if you are willing to take my word for it," and then from then on we didn't touch her things and she knew we weren't using their things. As far as the etchings, I am very sorry, because I take pride in my possessions, and I know she does in hers, and I would be very sorry that I would be responsible for her losing her etching or her painting, but I didn't ever see them.

Q. All right. Now, during the course of time that you were there, did you make any repairs to the premises? A. Yes.

Q. Just what?

The Court: The answer is yes.

The Witness: Yes.

Q. (By Mr. Spohn): Just what work or repairs did you make to the premises?

A. In the kitchen, the sink board, there is a

(Testimony of Beatrice Wilson.)

small sink, and [177] then there is a cupboard and it was just painted, and we bought some red—good linoleum and put it down with stainless steel bands, you know, did a good job to put it down properly.

Q. Did you make any other repairs or improvements?

A. We completely painted the bathroom.

Q. At whose expense?

A. Ours. Mr. Wilson did the painting. We bought the paint. We painted the breakfast room.

Oh, and in the attic, there was a maid's room. We painted that, and we had furniture there and used it as an overflow guest room when we needed it.

Q. During the time that you were in occupancy of these premises, did you spend any money or do anything by way of repairing or cleaning any of the furniture?

A. No, we didn't touch their furniture, but we did spend some money on keeping the house in order.

Q. Before you get to the house proper, did you do anything about the two rugs that have been mentioned?

A. Oh, yes. Their rug was down in the living room and I didn't use that rug, because it was their good rug. We sent it out to be cleaned, and at that time I asked Mrs. McKittrick if she didn't want to send the other rugs that were rolled up in the attic, and she said no, she didn't think so, but I told her that rolled up rugs that were not cleaned were a fine source of moths. [178]

Q. What did you do with the rug that you had

(Testimony of Beatrice Wilson.)

cleaned? Did you continue to use it? A. No.

Q. What did you do with it?

A. Rolled it up and put it down in the basement, wrapped in big paper. When we left, we unwrapped it so they would know where it was, and laid it on the billard table. It was never used. Unwrapped it and laid it there for them to know where it was, the day—our moving day.

Q. Did you do anything about de-mothing the premises? A. Yes.

Q. In other words, did you spend any money or make any efforts to meet the moth situation?

A. Well, I keep my house by having a colored woman come one day a week to do the heavy work and spring cleaning and fall cleaning. I would send her to the attic where she would run the vacuum sweeper, and we bought the Monarch bombs and closed up the windows and shot the bomb around until the whole bomb was expelled, and that is what we did in the attic at times. I saw that moths were there, evidence of them, and I would go up and shoot them. I didn't unroll the rugs, nor did I unfold all the bed rolls and mattresses and things. Mrs. McKittrick knew they were there, knew that they weren't cleaned when put away, or not properly wrapped in heavy paper, and that is the only way I know that moths can be kept out. [179]

Q. Did you let off any of those bombs more than once?

A. Oh, yes. We were there three years, and I cleaned house spring and fall each year.

(Testimony of Beatrice Wilson.)

Q. So that, at least twice a year, you de-mothed the place?

A. Yes. Personally, I didn't go up there and wield the vacuum sweeper myself. I don't do that.

Q. When you left the premises in November of 1949, did you clean them out, or have them cleaned out?

A. I didn't touch their things. I cleaned our things.

Q. When you say, you didn't touch their things——

A. In the attic.

Q. Did you have anything done downstairs in the living quarters?

A. Oh, yes. Mrs. McKittrick came the day that we were moving. I mean, the movers were going in and out with things, and I asked her to come back the next day, we were still in a mess. You know how upsetting it is. And the next day, it was raining very, very hard, and my colored woman and I went there and the two of us went through the whole house and we cleaned it thoroughly. I mean, we swept out every little bit of trash and burned it in the fireplace, the only place to burn it. It was cold and wet.

Q. Did Mrs. McKittrick come in that day?

A. Not while I was there. I don't know. I left the key on the mantel. They knew I was leaving it there; that was prearranged. [180]

Q. Now, during the time that you were there, did you do anything to the garden?

A. Yes.

Q. What?

(Testimony of Beatrice Wilson.)

A. We had a gardener who came once a week. He also works for the Fergusons next door.

Q. Do you know his name?

A. Oh, yes, he still works for us.

Q. What is his name? A. Jack Kopp.

Q. Where does he live?

A. I have his address written at home. He is an old Dutchman and he is a very neat man, and he kept the shrubs and the lawn cut very neatly, we thought. We were surprised to hear——

Q. Did he come regularly while you were there?

A. Once a week.

Q. Did you have him do any work when you left?

A. No, because he had been coming once a week, and it was all neat—I mean, we thought it was.

Mr. Spohn: I have no further questions of Mrs. Wilson.

The Court: Any further examination?

Cross-Examination

By Mr. Cornish:

Q. You didn't do any de-mothing in the attic yourself? [181]

The Court: She said so already, counsel.

The Witness: I said I did not do the vacuuming; I don't do vacuuming.

Q. (By Mr. Cornish): You did the de-mothing?

A. Yes. It doesn't take any physical effort to put your finger on a bomb.

Mr. Cornish: I have no further questions.

Mr. Spohn: I would like to recall Mr. McKittrick for one question.

The Court: As an adverse party?

Mr. Spohn: No, I am sorry. I would like to recall Mr. Wilson.

The Court: All right.

(Witness excused.)

BRUCE A. WILSON

recalled in behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination

By Mr. Spohn:

Q. Mr. Wilson, you have already heard the testimony today; you have been here. Do you recall exactly what happened at the time you had the conversation about renting the house in July of 1946?

Mr. Cornish: Objected to, if the Court please, as having been asked and answered on direct.

Mr. Spohn: If your Honor please, there is some controversy, [182] some difference in testimony, and I should like to question this witness precisely as to what happened, so that it may be clear. The plaintiff's position——

The Court: The objection, technically, is sound. In other words, as I understand the purpose of rebuttal is not to reiterate what he said on direct; it is to answer new contentions that have been made, or new statements that have been made on the defense case.

Mr. Cornish: All right.

(Testimony of Bruce A. Wilson.)

The Court: And if he has already testified as to what happened, he would have to do it again. Saying it twice doesn't prove it any more.

Mr. Spohn: In the light of the Court's statement, I will ask these specific questions.

Q. When you went to rent the premises from the defendants, did you offer to give them \$135.00 a month for the premises. A. No.

Mr. Cornish: Objected to as having been asked and answered on direct.

The Court: I will overrule that objection. It wasn't put that way. The answer is no and it will stand.

Q. (By Mr. Spohn): Did you offer to give them—to give the defendants \$300.00 in advance?

Mr. Cornish: I object to that, if the Court please.

The Witness: No. [183]

Mr. Cornish: As having been asked and answered, and on the further ground that it is leading and suggestive.

The Court: Just a moment, I want to find out, did you finish the question?

Mr. Spohn: Yes.

The Court: I will overrule the objection so we will get the testimony before us. The answer is no?

The Witness: No.

The Court: Let it stand.

Q. (By Mr. Spohn): Did you say to the defendants that the O.P.A. was not then in effect and that

(Testimony of Bruce A. Wilson.)

it would be perfectly all right for you to give them a check for \$300.00?

A. If you make it in two questions, I will answer the first part of the question, no—the first part, yes, and the second part, no.

Q. Well, what——

Mr. Cornish: Would you read the question and answer, please?

The Court: You had better understand the question now.

(Question and answer read.)

The Witness: Definitely, no.

Mr. Spohn: No further questions.

The Court: You may cross-examine.

Cross-Examination

By Mr. Cornish:

Q. You say you did make the statement that the O.P.A. was not in effect? [184]

A. I believe I did. I think there was a general discussion on the subject at the time, because it was just a matter of record in the newspapers.

Q. Why did you give a check for \$300.00 in advance if the O.P.A. wasn't in effect?

A. I was asked for it.

Q. You were asked for it? A. Yes, sir.

Q. Why didn't you right then insist on that being put in the lease that was signed?

A. I don't know why I did or did not.

(Testimony of Bruce A. Wilson.)

Q. Did you ask Mr. McKittrick to put it in the lease? A. No.

Q. You know the lease was changed to reduce the amount of rent from sixteen hundred twenty to thirteen hundred twenty, don't you?

A. I can't answer that question.

The Court: Well, he asked you if you knew that. Did you or didn't you?

The Witness: No the lease was written out—this first lease that has been submitted, was written out.

The Court: Are you talking about the one that Mr. McKittrick had?

The Witness: That is correct.

The Court: Yes. [185]

The Witness: When we got there the second night, and as a result of the discussions, if my memory serves, it was changed and I initialed the changes which brought about the check for one hundred ten, plus the check for three hundred.

Q. (By Mr. Cornish): Did you ask Mr. McKittrick to change the lease to provide that you paid him \$300.00 cash? A. No, I did not.

Q. Did Mr. McKittrick offer to change the lease to show that you had paid him \$300.00 in cash?

A. I don't recall that he did.

Q. And you knew at the time that you gave that check and at the time you signed the lease, that the lease provided for the payment of \$300.00 less rent than you intended to pay? A. No.

Q. Well, you intended to pay \$300.00 rent?

(Testimony of Bruce A. Wilson.)

A. I intended to pay \$135.00 per month.

Q. All right, and the lease provided for thirteen hundred twenty, didn't it?

A. Originally, sixteen hundred twenty.

Q. When you signed it, it provided for thirteen hundred twenty? A. That is correct.

Q. All right. Then, you knew that the lease provided for \$300.00 less rent than you intended to pay?

A. That's right. [186]

Q. All right. Now, why did you sign a lease providing for \$300.00 less rent than you intended to pay?

A. Go back to the question you asked me earlier in the afternoon, and the answer was that we were told that the O.P.A. at that time—had given them telephone approval for an advance, and the advance was, as it developed, to \$135.00 a month, and that the paper work needed to be done, and would we therefore put up a check of \$300.00 covering the difference until such time as that was completed.

Q. Did you believe that? A. Yes, I did.

Q. Didn't you testify just about two minutes ago that you knew the O.P.A. wasn't in force?

A. At that particular time, it was rumored that it would be out for a week, and back in a week. If you look in the papers, it is very well covered.

Q. It was in force at the time, wasn't it?

A. That is correct as far as I know.

Q. Then, the matter of whether they had an application pending wouldn't make any difference in

(Testimony of Bruce A. Wilson.)

the amount of rent that you paid at that time, would it? A. I wouldn't—

Mr. Spohn: Objected to as calling for a conclusion, and it is argumentative.

The Court: He said he didn't know, so it wouldn't make [187] any difference.

Mr. Cornish: I have no further questions.

Mr. Spohn: No further questions.

The Court: I want to ask this witness a question before we get any further:

Q. Mr. Wilson, in regard to this situation about your understanding of what the situation was with the O.P.A.— A. Yes.

Q. —was it your understanding that the O.P.A. regulations were not in effect but that they were coming back into effect right away?

A. Judge, if I recall, there was an announcement made, or rather, the O.P.A. ran out—

Q. On June 30.

A. —I guess that was at the same time; I am not sure. But in any event, that it was a matter of some very short period when it would be renewed, because it hadn't had an opportunity to go through the Congress at that time, and that there was never any question but what it would not be back on.

Q. All right. Was that what you meant when you said that you knew that the O.P.A. was not in effect at that time?

A. That's right. There was a lapse of maybe a week or ten days when, if my memory serves, when it was not in effect.

(Testimony of Bruce A. Wilson.)

The Court: All right, I have no further questions.

In view of the questions that the Court has asked, counsel, [188] does counsel desire to ask any further questions?

Mr. Spohn: No.

Cross-Examination
(Continued)

By Mr. Cornish:

Q. Notwithstanding the fact that you knew the O.P.A. was not in effect, it is still your statement—your testimony, that they told you that they had asked for an increase?

A. They told us that they had a telephone okay for an increase in the rent.

Q. Whom did they tell you they got the O.P.A. from? A. What.

Q. Did they tell you the O.P.A. wasn't in existence? A. No.

The Court: That is argumentative.

Q. (By Mr. Cornish): Let me put it this way: did you ask them from whom they got the approval?

A. No, it was volunteered information.

Q. All right. Whom did you think they got it from?

A. I just said I assumed it was the O.P.A. That is what we were told.

Q. Did you discuss with them the fact that they couldn't get approval from the O.P.A. if it didn't exist? A. No.

(Testimony of Bruce A. Wilson.)

Q. You didn't discuss that? A. No. [189]

Q. Now, all this time that you were paying this \$135.00 per month, you knew you were paying above ceiling rent, didn't you? A. No, I did not.

Q. You are sure of that? A. Yes, sir.

Q. Were you ever notified by the O.P.A. that the rent had been increased? A. No, sir.

Q. Had you ever asked the O.P.A.?

A. No, sir.

Q. You just stayed completely away from them until you moved out of the place?

A. That is correct, I did. I had no reason to go to them.

Mr. Cornish: I have no further questions.

The Court: The witness will be excused.

Mr. Spohn: No further questions here.

(Witness excused.)

The Court: Do you rest? Do you have anything in the nature of surrebuttal?

Mr. Cornish: No, your Honor.

Mr. Spohn: If your Honor, there is but one point. I think it is almost beyond mention, but in order that the record may be complete, to clear up this point about any telephone approval by O.P.A.—

The Court: Do you have a witness here? [190]

Mr. Spohn: Yes.

The Court: In rebuttal?

Mr. Spohn: Yes. The facts were these, your Honor——

Mr. Cornish: Who is contending there was any telephone approval by O.P.A.? We haven't.

The Court: That is right; they have denied that there was a telephone approval.

Mr. Cornish: We have denied we said anything about it, and I know perfectly well the O.P.A. couldn't approve an increase by telephone.

The Court: Well, that would be impeaching your own witness, counsel.

Mr. Spohn: We will rest.

Mr. Cornish: We rest, too. I assume your Honor doesn't want argument at this time?

The Court: Other than in writing. I do want your theories argued. I don't want any Philippias on the subject, but I do want a concise statement on the facts and the law. The plaintiff will have the privilege of opening and the defendants will respond and the plaintiffs close. I presume, however, that the main points at issue here are going to be raised by the defense rather than by the plaintiff. The theory of the Plaintiff's case has followed the same pattern as most of these rent violation cases.

Now, Mr. Cornish, if you would desire to assume the burden [191] of the opening brief—if you don't object, Mr. Spohn—I would prefer to see it that way—have you state the theory of your case, that is, your defense.

Mr. Cornish: For the convenience of the Court, I would just as soon do it, but with other matters that I have in the office, it would be impossible for

me to file an opening brief before the 20th of January.

The Court: I see.

Well, then, we had better follow the regular procedure.

Mr. Cornish: I have no objection to filing the first one, but I have got an appeal that I am taking from the United States District Court in Nevada and it is going to take quite a lot of time, because in designating the record, there is a lot of duplicate exhibits that have to be eliminated, and I would hate to promise your Honor that I could get it in in ten days. My time is up on the 12th of January.

The Court: Well, let's follow the orderly fashion, and ten, ten and five, that will be January 10, January 20, and January 25. Does that meet with your approval?

Mr. Cornish: Yes.

Mr. Spohn: Yes, your Honor.

The Court: The case will be continued for submission, counsel will present briefs, the plaintiff's opening brief due on January 10, the defendants' reply brief due on January 20, and the plaintiff's closing brief on January 25, and the matter [192] will be continued for submission until January 26—Friday, January 26.

Now, insofar as submission is concerned, it is not necessary for counsel to be present, but it is going to be continued to that day and will come up on the calendar and will be submitted unless there is some further argument that is to be made in view of the briefs; and if there is, why, I would ask counsel

to notify the clerk of this Court so I will know if there is going to be any further argument, but I don't anticipate that there should be. It will then be submitted and decided.

Mr. Cornish: Yes. I take it your Honor is concerned more with the brief on the law than the brief on the facts?

The Court: That's right.

Mr. Cornish: And there are certain conflicts of fact, that you don't want us to argue?

The Court: If you want to argue any of the factual portions of the evidence that has been introduced here, you may do so. I am not going to foreclose you.

Mr. Cornish: I will argue loud and long why your Honor should believe my clients instead of the other side.

The Court: I know, but what I am most interested in is your theory of the law here that you raised. I will frankly say that you have raised what is a rather novel defense to these proceedings and I want to see them sustained in law, because you [193] must well know that these cases come through these courts, numbers of them, from this Southern Division of the Northern District, and that the courts are therefore familiar with this type of proceeding; and since you raised the points, I expect you to assume the burden of establishing your defense in law.

Mr. Cornish: The points your Honor, I believe brought out in that Porter case in which there were a number of different overcharges for which they sought to make restitution, and after hearing the

facts, the Court only ordered restitution in two, and the opinion brings out the reason.

The Court: There are a number of cases on this restitution, and I want your competent analysis of the cases in order to give the Court a fair view of your theory. Now, if we started to review all the cases on this subject, I would run into hundreds of cases.

Mr. Cornish: I appreciate that.

The Court: Because they have been appealed in every Circuit in this country, and I think every Circuit has a number of cases on the subject from a number of aspects, so I want a brief statement on the law and of your cases in point as nearly as possible. That is the order upon which this matter will be continued for submission, and I don't want to the briefs any more lengthy than possible, but I don't want to limit you in your arguments.

Mr. Cornish: Would you prefer that we merely cite the [194] authorities or that we quote the pertinent parts of the decisions?

The Court: That depends on what you think demands emphasis.

Mr. Cornish: Does your Honor prefer to read the case?

The Court: It depends on whether or not you are citing cases that are—I prefer you to use your own judgment on what you think is important——

Mr. Cornish: Fine.

The Court: ——to develop your own theory. We have read a considerable number of cases. We read them when different problems come before us, but

you can't tell what is in my mind, and I want you to use your own judgment.

Mr. Spohn: We understand, your Honor.

The Court: And the Court will be at recess.

Certificate of Reporter

I Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 195 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ C. E. MONEYHUM.

[Endorsed]: Filed September 4, 1951. [195]

In the United States District Court for the Northern
District of California, Southern Division

No. 29940—Civ.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD McKITTRICK and BARBARA McKIT-
TRICK,

Defendants.

**CERTIFICATE OF CLERK TO RECORD
ON APPEAL**

I, C. W. Calbreath, Clerk of the United States
District Court for the Northern District of Cali-

fornia, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true copies of orders entered therein, in the above-entitled case and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Complaint for injunction, etc.

Answer.

Plaintiff's request for admissions.

Reply to request for admission of facts.

Plaintiff's interrogatories.

Answers to interrogatories.

Order for judgment, filed February 12, 1951.

Amended order for judgment, filed April 26, 1951.

Findings of fact and conclusions of law.

Judgment and decree.

Cost bill.

Motion for a new trial.

Notice of time and place of hearing motion for new trial.

Order denying motion for new trial.

Notice of appeal.

Statement of points on appeal.

Order extending time to docket appeal.

Designation of portions of record to be included in the record on appeal.

Reporter's transcript.

Plaintiff's Exhibits 1 to 4.

Defendants' Exhibits A to D.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 10th day of September, 1951.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13088. United States Court of Appeals for the Ninth Circuit. Donald McKittrick and Barbara McKittrick, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 11, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
Case No. 13088

DONALD McKITTRICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON APPEAL

In presenting their appeal, defendants and appellants intend to rely upon the following points:

1. The tenants admitted instigating and inviting the overcharges, and it was error to grant treble damages;

2. This was an action for restitution. The burden was on the plaintiff below to show a good reason for restitution. The trial court erroneously relieved the plaintiff below from that burden and placed upon defendant below the burden of showing a good reason why restitution should not be granted;

3. There was evidence before the trial court sufficient to sustain a judgment denying restitution which might have been controlling had the court not erroneously shifted the burden of proof.

Dated September 18, 1951.

/s/ FRANCIS T. CORNISH,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 19, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF THE
RECORD TO BE PRINTED ON APPEAL

Appellants hereby designate the following portions of the record to be printed to constitute the record on appeal herein:

1. The complaint;
2. The answer to the complaint;
3. The findings of fact and conclusions of law;
4. The Judgment;
5. The motion for new trial;
6. The order denying motion for a new trial;
7. The notice of appeal;
8. The designation of portions of the record to be included in the record on appeal;
9. The statement of defendants filed under Rule 75-d;
10. The order extending time to docket appeals;
11. The following portions of the reporter's transcript of the trial:

* * *

12. The following exhibits:
Plaintiff's Exhibit 2;
Defendants' Exhibit C.

Dated September 18, 1951.

/s/ FRANCIS T. CORNISH,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 19, 1951.

[Title of Court of Appeals and Cause.]

COUNTER-DESIGNATION OF CONTENTS OF
RECORD TO BE PRINTED ON APPEAL

Comes now the United States of America, Appellee in the above-entitled cause, and designates the following portions of the record to be printed on appeal:

1. Plaintiff's Request for Admissions.
2. Defendants' Answer to Plaintiff's Request for Admissions.
3. Plaintiff's Interrogatories.
4. Defendants' Answer to Plaintiff's Interrogatories.
5. All portions of Reporter's Transcript of Testimony and Exhibits not included in Appellants' Designation of Record to Be Printed.
6. Appellants' Designation of Portions of Record to Be Printed.
7. Appellee's Counter-Designation of Contents of Record to Be Printed on Appeal.

Dated this 26th day of September, 1951.

/s/ SIDNEY FEINBERG,
Attorney for Appellee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 26, 1951.